Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2009

DENNY ROSS,
Petitioner

v.

NANCY H. ROGERS, Attorney General of the State of Ohio, and SUMMIT COUNTY COURT OF COMMON PLEAS,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is contrary to, or an unreasonable application of, clearly established federal law for appellate courts to limit their review of whether the Double Jeopardy Clause bars retrial of a defendant following a mistrial declared over his objection to the matters of record at the time of the trial court's oral declaration of mistrial and to refuse to consider subsequent developments which occurred while it was still within the trial court's power to reconsider whether manifest necessity for a mistrial existed (such as the discovery in this case that the jury had reached verdicts on three counts before it was discharged).

2. Whether it is contrary to, or an unreasonable application of, clearly established federal law for appellate courts to view mistrial declarations premised on juror bias or misconduct with the highest level of deference to the trial court's discretion in all cases, regardless of the surrounding circumstances and regardless of the state of the trial court's knowledge regarding what actually occurred.

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STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit was entered on September 10, 2007; petitioner's timely motion for rehearing was denied on July 17, 2008. This Court has jurisdiction to review the judgment of the Sixth Circuit on a writ of certiorari under 28 U.S.C. §1254(1).

THE CONSTITUTIONAL PROVISION INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

> proceeding to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;
>
> nor shall private property be taken for public use, without just compensation.

Fifth Amendment, United States Constitution.

STATEMENT OF THE CASE

In June, 1999, petitioner Denny Ross was indicted in the state of Ohio on charges of aggravated murder, rape, kidnapping, and two other charges; in October, 1999, a death penalty specification was added.[1] Trial began on September 28, 2000, and the jury began deliberating at 9:00 am on October 27, 2000.

The events of October 28, 2000: on the record

On October 28, 2000, at approximately 2:00 pm, in an unrecorded chambers conference, the trial judge (Judge Bond) notified counsel that she had received a note from the jury. That note read:

> There is a concern about a Juror. I was approached by a spokesperson for 4 other Jurors. From comments made by this Juror these 4 Jurors feel that he is agreeing with the group to expidite [*sic*] this process. I was told

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[1] The kidnapping charge was dismissed by the trial court at the close of the prosecution case.

by these Jurors that they [*sic*] following comments were made

1.) We need to get this done today.

2.) Why are we even discussing this.

He has stated all along that he believes one thing but has all to [*sic*] quickly changed his vote to go along with the group. This morning this Juror stated to me that we need to finish this today as he will be leaving after today because he has a problem at home but he did not want to put us in that position.

To another Juror he made the comment that he knows that Brad O'Born was innocent because he passed a polygraph test so Denny Ross had to be guilty.

I have been asked if this Juror can be released so that he may tend to his affairs at home, and we can have an impartial and fair jury.

Juror # 4

Court reconvened on the record at about 3:50 pm, counsel having been accorded the intervening time for consultation. Judge Bond inquired as to the parties' positions regarding discharging the jury without prejudice. The prosecution consented to the granting of a mistrial "based on the information that we have about this juror and the note we received" because "[w]e *believe in the defendant's right to a fair trial . . . .*" (emphasis added). The defense first asked the judge to rule on a pending motion directed to the multiple

misrepresentations in the prosecution's closing argument; Judge Bond rejected the request, finding the motion "not ripe," as the state had not yet had an opportunity to respond. The defense next proposed that the jury be instructed to continue to deliberate, leaving the defense the option of moving for a mistrial in the event that the jury returned guilty verdicts, on the theory that "the extra-judicial evidence that exists in the jury room is not evidence that is favorable to the defense and hence we believe a verdict of not guilty would not be tainted." Judge Bond rejected that option as "fundamentally unfair to the State." The defense then moved for a mistrial with prejudice, which was denied.

Judge Bond then inquired directly of Ross whether he would consent to a mistrial; he responded that he would not. Judge Bond then pointedly told Ross that the "statements that have come from this jury are extremely damaging to the prospect that you could receive a fair trial" because the "note was saying that at least one juror believes you're guilty based upon no evidence that was presented during the trial."[2] Ross told her that he understood and continued to oppose a mistrial.

Judge Bond then expressed several concerns: (1) that in refusing to continue deliberations fully and fairly, the juror was refusing to fulfill his obligations as a juror; (2) that the juror was relying on evidence not

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[2] There was no evidence before the jury that O'Born had taken and passed a polygraph examination.

presented at trial; (3) that the juror had violated his obligation to inform the court during the empanelment process that he believed that Ross had to be guilty because O'Born had passed a polygraph and that he had pressing matters at home that required his attention. Judge Bond found:

> [A]s a result of his representations to other jurors ... he has impeded full and fair deliberation of the evidence in this case and ... this Court is absolutely convinced that there's no way what the bell has struck I can unring.
>
> And his representations to other jurors regarding the guilt of Mr. Ross based upon this purported polygraph test I don't believe could be purged. And I don't believe seating an alternate at this point in time could undo the damage that's been done to the deliberations in this case.

After both parties declined her offer to voir dire the jury during deliberations, Judge Bond stated:

> [B]ased on its stated conclusions and based upon the face of the communication given by Juror No. 4, and since neither party wishes additional inquiry to be made by the court in regard to a voir dire of any of the potential jurors, Court finds that the jury is unable to fulfill the obligations required by law, to fully and fairly consider the evidence and render a verdict based upon the evidence and the law in this case.

At that point, the defense interjected, stating that, while it continued to adhere to its position that voir dire at that time would have a prejudicial impact on the jury's deliberations, it wanted to ensure that inquiry would be made before the jury was discharged. The judge responded that it would "permit inquiry of the jury after a decision has been made by the Court if the jury is discharged." The judge then ruled:

> [B]ased on the representations made, the Court finds pursuant to Ohio Revised Code 2945.36 that there is corruption of a juror pursuant to subsection A. The Court finds that this jury cannot render a fair and impartial verdict in accordance with the law. The Court therefore discharges the jury without prejudice to the prosecution. A mistrial is declared.

Judge Bond told counsel that she would "summons" the jury and discharge it from further attendance and that she would allow inquiry to be made of the jury that day, once it had been discharged. She further told counsel that she would discuss with them the procedure to be followed for such inquiry before the jury was discharged. The on-record proceedings ended at 4:00 pm.

The unrecorded events of October 28, 2000[3]

Judge Bond thereupon left the bench and entered her chambers, from which she emerged after a very short interval and proceeded directly to the jury room, unaccompanied by counsel or a court reporter. Contrary to her representation to counsel that she would summon the jury and discharge them and that she would address the procedure for questioning the jurors with counsel before the jury was discharged, Judge Bond told the jurors that she had declared a mistrial and that their services were no longer needed.[4] A number of jurors were understandably upset, and the judge offered to speak with them privately in chambers, an opportunity of which five jurors availed themselves. The rest of the jurors remained in the jury room.

The second of the five jurors told Judge Bond that the jury had reached not guilty verdicts on the aggravated murder, murder, and rape charges, following the judge's instructions to consider each offense, element by element. She further told the judge that the verdict forms for these offenses had been signed by all twelve jurors and placed in the verdict envelope provided by the court.

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3 The facts set forth in this section were established at the evidentiary hearing on Ross' motion to bar retrial on double jeopardy grounds.

4 This was the first time in Judge Bond's 12-year tenure on the bench that she had ever failed to discharge a jury in open court.

The verdicts had been reached during the morning session, before the jury broke for lunch. The note was authored after the lunch break, and referred to events which had occurred after the three verdicts were reached.

Judge Bond dispatched the bailiff to the jury room to retrieve the verdict envelope, which was taken to her chambers. She did not advise counsel of the verdicts. Defense counsel had earlier sought to speak with Judge Bond to ascertain what was happening, but was told that he would have to wait, as the judge was meeting privately with jurors. Later, counsel again sought to meet with the judge but was again told that he would have to wait, this time because she was speaking with a reporter.

The jury remained together until about 5:30 pm, when they left the building. Only after the jurors had dispersed did Judge Bond inform counsel that there had been verdicts, "if you want to call them that." No inquiry of the jury was ever made. The mistrial order was not finalized by a journal entry until November 2, 2000.

Subsequent proceedings

When court reconvened on October 30, 2000, Judge Bond announced her intention to set a trial date. Counsel objected, informing her that Ross would be filing a motion to bar retrial on double jeopardy grounds – which he did shortly thereafter – and would be seeking her recusal on the ground that she was a witness to the proceedings. The Ohio Supreme Court, on Ross' motion, ordered Judge Bond's recusal based upon the significant likelihood

that she would be called as a witness. The case was reassigned to Judge Cirigliano.

The evidentiary hearing

Much of what emerged at the evidentiary hearing has already been discussed. Additional pertinent testimony was provided by Judge Bond. She testified that the fact that a juror was unwilling to deliberate would not have necessitated a mistrial, as there were alternates available who could have been substituted for the recalcitrant juror. She described the information in the note as, at best, second-hand hearsay, and potentially even more attenuated. For all she knew, the note could have been a hoax or the statements in it inaccurate. She had wanted to voir dire the jury, as that was, in her mind, the only possible way of avoiding a mistrial. Had the jury been voir dired, she might have been able to conclude that curative instructions or the seating of an alternate would suffice to cure the problem. Judge Bond admitted that she was unfamiliar with the "concept that even where there has been judicial or prosecutorial error prejudicing a defendant's prospects of securing acquittal, the defendant may nonetheless desire to go to the first jury and perhaps end the dispute then and there with an acquittal."

She did not record the verdicts or tell counsel about them because the "trial was over. We were finished." She was certain that defense counsel would have asked her to record the verdicts if they had been made aware of them while the jury was still present. She did not believe that she could have

accepted the verdicts without first conducting a thorough voir dire of the jury.

Judge Cirigliano's opinion (Appendix ("A") at 1)

Judge Cirigliano, based upon the entire record before him, granted Ross' motion to bar retrial on double jeopardy grounds, concluding that Judge Bond "had failed to scrupulously consider and investigate the alternatives to a mistrial." A16. She had, he continued, "no first-hand knowledge on which to base [her] conclusion that the jury was tainted and incapable of completing its deliberations" but instead relied solely on the "second and third-hand knowledge" contained in the foreperson's note. *Id.* Based on the information available, "it was not possible to know if the jury was tainted and if it was tainted, whether that taint was material and incurable." A17.

Judge Bond, he continued, had also acted precipitately in granting a mistrial, as the problem arose late on a Saturday afternoon, and she could have adjourned the proceedings to permit additional time for consideration of alternatives rather than abruptly foreclosing further exploration of the matter. A17-18. There was, Judge Cirigliano ruled, no manifest necessity for the mistrial and, accordingly, retrial was barred by the Double Jeopardy Clause:

> The trial court abused its discretion in declaring a mistrial because it failed to investigate the information set forth in the jury note, it failed to explore alternatives to declaring a mistrial, it failed to take into

consideration the verdicts that had been reached by the jury, it failed to ascertain whether any prejudice existed as a result of the information related in the foreperson's note, it failed to attempt to cure any taint which may have existed, it acted precipitately in the declaration of a mistrial, and it failed to duly consider the defendant's right to have his trial completed by a particular tribunal, especially in light of the fact that this is a capital case. *See United States* v. *Perez*, 22 U.S. (9 Wheat) 579, 580 (1824)

A18.

The Ohio Court of Appeals decision (A19)

The state appealed, and the Court of Appeals reversed Judge Cirigliano in a 2-1 decision. The Court limited its review to the on-record proceedings of October 28, 2000, and faulted Judge Cirigliano for holding an evidentiary hearing and relying on evidence adduced at that hearing in determining whether there was manifest necessity for the mistrial. It was necessary, the Court stated, without citing any authority, to completely disregard everything not in the record of October 28, 2000, including the return of the three not guilty verdicts. A26.

Finding it permissible to simply take the note at face value and consider the information it contained "inherently reliable," the Court, employing an exceedingly deferential standard of review, ruled that Judge Bond had not abused her discretion in declaring a mistrial because she

allowed both sides to state their positions, considered their competing interests, and made inquiry into possible alternatives prior to declaring a mistrial. A31.

The dissenting judge pointed to the governing principle, ignored by the majority, that because of the importance of the defendant's "valued right" to have his trial concluded before a particular tribunal, the prosecution must bear the "heavy" burden of demonstrating manifest necessity for the mistrial. A41. He concluded that the wording of the note was too "slim [a] reed upon which to base the denial to the defendant of a right guaranteed to him by both the Ohio and United States Constitutions." A44. That right, he continued, could not be "take[n] away . . . unless the record amply supports the necessity for such action, and it is up to the trial court to create such a record, whether anybody asks for it or not." *Id.*[5]

The Magistrate Judge's Report and Recommendation (A46)

Ross next sought relief in the United States District Court for the Northern District of Ohio, pursuant to 28 U.S.C. §2254. The Magistrate Judge to whom the matter was referred recommended that habeas relief be granted under the "contrary to" clause, in that the state court decision both failed to place the burden on the state to demonstrate

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[5] The Ohio Supreme Court declined to hear Ross' appeal. A45.

manifest necessity for the mistrial and accorded a degree of deference to the mistrial ruling which was fundamentally inconsistent with Supreme Court precedent. A93-97. He also found relief warranted under the "unreasonable application" clause, finding that (1) Judge Bond's declaration of a mistrial, coming just two hours after the receipt of the note in a capital case, was unreasonably precipitate; (2) the state court acted unreasonably in not considering the totality of the circumstances surrounding the mistrial decision, including the discovery of the verdicts; and (3) the state court acted unreasonably in failing to consider the options available to Judge Bond after her discovery of the verdicts. A111-19. While "[r]easonable minds could conceive of several sensible alternatives," he stated, "denying consideration to this relevant information is not among them." A115. Rather, "once the judge learned of the signed verdict forms, a proper consideration of the defendant's double jeopardy interests mandated a reconsideration of her initial mistrial ruling." A116.

The opinion of the federal district court (A128)

The district court (Dowd, J.) granted the writ, disagreeing with the Magistrate Judge only as to the degree of emphasis to be placed on the discovery of the verdicts: "even if the verdicts had never been discovered, even if the verdicts did not exist, the record would still reveal the trial judge's utter failure to exercise the required 'scrupulous . . . judicial discretion' in the face of the jury foreperson's

question prior to the oral mistrial declaration." A159. In Judge Dowd's view, "[n]o one could seriously challenge" the facts properly found by Judge Cirigliano. A161. At the time of the mistrial decision, he continued, Judge Bond had "made no effort to ascertain the truth of what was contained in the foreperson's note;" the face of the note could not be "used as the basis for a mistrial over the defendant's objection in a capital murder case." A161. As the presiding judge, "she had a duty to make proper inquiry." A162.

> The mere fact that the jury foreperson wrote a note containing certain statements or allegations does not render a mistrial "manifest." The trial judge has a duty to explore the truth of the information in the note and the impact, if any, of that information on a jury's ability to deliberate. That simply did not happen here.

A163-64. The state court's criticism of Judge Cirigliano's "hindsight analysis" "ignor[ed] the fact that the information was not before the trial judge only because she herself failed to seek the information in a timely fashion." A162. There was "no way," Judge Dowd concluded, that "any reasonable person would conclude that the trial judge had employed a 'scrupulous' exercise of judicial discretion to determine that a mistrial was a manifest necessity." A162.

Although Judge Dowd did not consider the discovery of the verdict forms dispositive, he recognized that the "discovery changed the

circumstances faced by the trial judge and should not have been ignored." A163. He concluded that because there was no showing of manifest necessity for the mistrial, the state court's decision that retrial of Ross would not violate the Double Jeopardy Clause involved an unreasonable application of clearly established federal law. A163-64.

The Sixth Circuit's opinion (A178)

The Sixth Circuit reversed, in a 2-1 decision. The majority faulted the district court's application of the "scrupulous exercise of judicial discretion" standard articulated in *United States v. Jorn*, 400 U.S. 470, 485 (1971), because, in its view, that language was *dictum* and, hence, not clearly established federal law. A193. The state court's decision could not, the Court continued, be regarded as an unreasonable application of *Jorn*, as Judge Bond's decision was not "marked by *no* effort to exercise sound discretion" (emphasis added). Instead, the Court opined, the better guidance was found in *Arizona v. Washington*, 434 U.S. 497, 505 (1978), which spoke of the deference to be accorded to the trial court's assessment of possible juror bias. The Court also concluded that evaluating Judge Bond's actions based on a highly truncated record – one limited to the circumstances of record at the time the mistrial was orally declared – was not unreasonable. The Court termed Judge Bond's release of the jury without informing counsel of the verdicts and giving them an opportunity to be heard "far from commendable," A203, but nonetheless held that the state court's decision did not represent an

unreasonable application of clearly established federal law.

In dissent, Judge Guy expressed his belief that, even if manifest necessity for a mistrial existed at one point, "it dissipated once Judge Bond learned of the verdicts." A213. In light of the importance of a defendant's double jeopardy rights, he concluded, reexamination of the need for a mistrial was required, especially in light of the obvious fact that the existence of unanimous not guilty verdicts on three counts eliminated any possibility that Ross had been prejudiced by the matters recounted in the foreperson's note. The state court's finding that there was manifest necessity for the mistrial represented, in his opinion, an unreasonable application of clearly established federal law.

The Sixth Circuit subsequently stayed its mandate to permit Ross to seek certiorari review in this Court before he was again tried for the same offenses. A225.

REASONS WHY THE WRIT SHOULD BE GRANTED

Despite the fact that the jury unanimously signed not guilty verdicts on all capital counts *before* the concerns which prompted the foreperson's note arose, the State of Ohio claims the right to again seek to put Denny Ross to death. The state appellate court, in an opinion which is contrary to, or, at a minimum, represents an unreasonable application of this Court's controlling double

jeopardy jurisprudence, found such a second trial constitutionally acceptable. It is not, and petitioner Ross seeks this Court's intervention to prevent the impending double jeopardy violation in this case and to provide needed guidance to both state and federal courts regarding the appropriate scope of review of mistrial declarations over the objections of defendants and the standard of review to be applied.

I.

The state appellate court reached its constitutionally untenable result by unreasonably narrowing the focus of its manifest necessity assessment to the events of record as of the moment that Judge Bond orally declared a mistrial. It refused, as a matter of law, to consider the immediately subsequent events – all of which occurred before the mistrial was final under state law – which eliminated any manifest necessity for the mistrial (if any there was) and demonstrated Judge Bond's abdication of her responsibility to exercise her sound discretion in mistrying the counts on which the jury had reached verdicts: her solo entry into the jury room, without notice to the parties, her discharge of the jury without bringing the jurors into the courtroom to be discharged on the record, contrary to her uniform practice of 12 years, her representation to the parties that she would do so, and the defendant's right to be present at all stages

of the trial, including the discharge of the jury,[6] her denial to the defense of the promised opportunity to inquire of the jury regarding the subject matter of the foreperson's note, her allowing the jurors to disperse without further inquiry after her discovery of the not guilty verdicts, and her concealment of the not guilty verdicts from the parties until after all jurors had departed the courthouse.

In effect, the state court ruled that post-hoc evidentiary hearings on a defendant's motion to bar retrial on double jeopardy grounds are impermissible, as all that may lawfully be considered on the manifest necessity question is the contemporaneous trial record.[7] Such a ruling, and

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See Rogers v. United States, 422 U.S. 35 (1975); *see also United States v. Hanno*, 21 F.3d 42, 46 (4th Cir. 1994).

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The Sixth Circuit regarded this proposition as a mischaracterization of the state court's opinion. A207. It is not. The state court ruled that that there was no precedent for reviewing a mistrial decision based on evidence adduced at a post-hoc evidentiary hearing and that, as a matter of law, it was foreclosed from considering anything other than record of October 28, 2000. A26. The state court did not, as the Sixth Circuit stated, expressly acknowledge that Ross was properly afforded an evidentiary hearing. *See id.* Quite the contrary: the state court flatly stated that "the mistrial decision should be evaluated on the record that was prepared at [the time the mistrial was declared]." A ruling that it is impermissible to consider any information outside the trial court record at the time of the mistrial declaration is functionally indistinguishable from a ruling prohibiting after-the-fact evidentiary hearings on the manifest necessity issue, as if nothing adduced at the

the concomitant limitation of the manifest necessity inquiry to matters appearing in the original trial record, were contrary to well-established federal law which requires that the manifest necessity determination be based on *all* the surrounding circumstances, a proposition established 184 years ago in *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824): "[T]he law has invested Courts of justice with the authority to discharge a jury from giving any verdict whenever, *taking all the circumstances into consideration*, there is manifest necessity for the act, or the ends of public justice would be otherwise defeated" (emphasis added). *See Washington*, 434 U.S. at 506 (*Perez* standard "provide[s] guidance in the decision of a wide variety of cases"); *Wade v. Hunter*, 336 U.S. 684, 689 (1949)(describing *Perez* standard as "the guiding rule of federal courts for determining when trials should be discontinued"); *id.* at 690 (noting that "[t]he rule announced in *Perez* has been the basis for all later decisions of this Court on double jeopardy"). In turn, *Perez* has also been applied by this Court as "a standard of appellate review for testing the trial judge's exercise of his discretion in declaring a mistrial without the defendant's consent." *Jorn*, 400 U.S. at 481.

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hearing which is not already reflected in the trial record may be considered, the result is the same as if no evidentiary hearing were ever held. As the district court concluded, "the Ohio court's refusal to consider some of the evidentiary material before it actually affected [Ross'] ability to make his double jeopardy argument before that court and had the *effect* of denying him a hearing." A172 (emphasis in original)

Reduced to its essence, where the defendant has not sought a mistrial, "the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v. Dinitz*, 424 U.S. 600, 607 (1976), *quoting Jorn*, 400 U.S. at 485.

This Court has consistently eschewed the formulation of fixed rules regarding what trial eventualities will and will not present manifest necessity for a mistrial in recognition of the many and varied circumstances with which trial judges may find themselves confronted. *See, e.g., Washington*, 434 U.S. at 506 ("manifest necessity" "do[es] not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge"); *Illinois v. Somerville*, 410 U.S. 458, 462 (1973) (the *Perez* standard "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial"); *Jorn*, 400 U.S. at 480 (noting that Court had "explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial"). The *Perez* standard, which includes the critical admonition that "the [mistrial] power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; *and in capital cases especially courts*

should be extremely careful how they interfere with any chances of life in favor of the prisoner," 22 U.S. (9 Wheat) at 580 (emphasis added), in conjunction with the fundamental importance of the defendant's "valued right to have his trial completed by a particular tribunal," *Wade*, 336 U.S. at 689; *Downum v. United States*, 372 U.S. 734, 736 (1963),[8] demand careful consideration by both trial courts and appellate courts of *all* the surrounding circumstances, *including* information which comes to the trial court's attention before the mistrial decision becomes irrevocable upon dispersal of the jury.[9] Any other conclusion would gravely imperil the

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[8] *See, e.g., Somerville*, 410 U.S. at 471 ("The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one"); *Jorn*, 400 U.S. at 486 (trial judge "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate").

[9] Federal courts have widely recognized that there is nothing talismanic in an oral declaration of mistrial and that a mistrial declaration remains open for reconsideration until the jury has been discharged and has dispersed. *See, e.g., United States v. Razmilovic*, 507 F.3d 130, 141-41 (2d Cir. 2007); *Creighton v. Hall*, 310 F.3d 221, 228 (1st Cir. 2002); *Camden v. Circuit Court*, 892 F.2d 610, 616 n.7 (7th Cir.1989); *United States v. Smith*, 621 F.2d 350, 352 n. 2 (9th Cir.1980).

double jeopardy rights of many criminal defendants.

The state court's curtailment of the manifest necessity inquiry unreasonably leaves a criminal defendant's double jeopardy rights at the mercy of what the trial judge chooses to include in the trial record and, if generally applied, would often foreclose meaningful appellate review of the manifest necessity determination. The effect of such a truncated focus is to freeze the manifest necessity inquiry at a particular point in time – the moment when the trial court announces the mistrial – regardless of whether additional extra-record information came to the trial court's attention, while it was still within its power to reconsider the mistrial order, which eliminated the manifest necessity for the mistrial or changed the factual landscape against which alternatives were to be weighed and sound discretion exercised.[10]

The inevitable result will be criminal defendants forced to undergo second trials, with all their attendant stress, anxiety, and expense, contrary to their paramount right, guaranteed by the Double Jeopardy Clause, to be free from such prosecution

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10 The mistrial declaration was not final under state law at the time it was orally rendered. Although it may have been functionally final at the time the jury left the courthouse, it was not final as a matter of state law until it was journalized by Judge Bond, which did not occur until five days later. *See State v. Stewart*, 2002 WL 31886657 at *3 (Ohio App. 11 Dist. Dec. 27, 2002)("The trial court's mistaken oral declaration of a mistrial did not actually result in a mistrial because a mistrial judgment was never journalized"); *see also* A108-11.

in the absence of manifest necessity for the mistrial. *See Green v. United States*, 355 U.S. 184, 187-88 (1957)("The underlying idea, one that is deeply ingrained in . . . the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty"); *accord Washington*, 434 U.S. at 503-04.

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. *If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.*

Green, 355 U.S. at 198 (emphasis added). The state court in this case engaged in just such a "narrow, grudging application" of the Double Jeopardy Clause, one antithetical to the preservation of the important safeguards which it decrees.[11]

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[11] Defendants would not be the only ones to benefit from a ruling that limitation of the manifest necessity inquiry to the matters of record at the time the mistrial is first declared was contrary to, or an unreasonable application of, clearly

The state court's curtailment of the manifest necessity inquiry is also fundamentally inconsistent with a number of other core double jeopardy principles, the first and foremost of which is that a defendant may under no circumstances be reprosecuted for an offense after he has once been acquitted of it. *See, e.g., Green*, 355 U.S. at 188; *Washington*, 434 U.S. at 503; *Sanabria v. United States*, 437 U.S. 54, 64 (1978); *Ball v. United States*, 163 U.S. 662, 671 (1896). In a case such as this one, in which the jury finalized verdict forms prior to their discharge, this fundamental precept must necessarily inform any sound exercise of discretion in determining whether manifest necessity for a mistrial exists. As the Magistrate Judge reasoned, once Judge Bond discovered that the jury had reached verdicts on the three most serious counts, "reasonable minds could conceive of several sensible alternatives; denying consideration to this relevant information is not among them." A115.

The "sensible" alternatives, without exploration

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established federal law. If consideration of information outside the trial record were to be prohibited, then the state would also be barred from relying on extra-record information to demonstrate that there was manifest necessity for the mistrial, an eventuality which would likely result in the barring of retrials which might have been found constitutionally acceptable based on a fuller exploration of the circumstances surrounding the mistrial decision. *See Glover v. McMackin*, 950 F.2d 1236, 1242 (6th Cir. 1991)(finding no manifest necessity for mistrial based on the existing record, but ordering that state be afforded an evidentiary hearing on remand at which it could attempt to demonstrate the existence of manifest necessity).

of which the mistrial cannot be said to have been the product of the scrupulous exercise of judicial discretion, include immediately informing counsel of the discovery of the verdicts, addressing with counsel the appropriate manner of proceeding, making inquiry of the jury as to whether the signed verdicts represented their final judgment on the three counts, and polling the jury to ensure unanimity.[12] The state court concluded that Judge Bond had not abused her discretion in declaring a mistrial because she had "allowed the parties to state their positions, considered their competing interests, and made a thorough inquiry into reasonable alternatives prior to declaring a mistrial." A29-30.

Even had that been the case at the moment of the oral mistrial declaration, the discovery of the verdicts profoundly changed both the balance of competing interests and the reasonable alternatives

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12

The Sixth Circuit referred to the verdicts throughout its opinion as "tentative." This characterization is without support in the record. The verdicts bore all the hallmarks of finality, at least in the minds of the jurors. Each of the three verdict forms was marked not guilty, signed by all members of the jury, and placed in the envelope provided for the return of verdicts. Juror Gribek, the second of the five jurors to speak with Judge Bond in chambers, testified at the evidentiary hearing that she told Judge Bond that, in reaching the three verdicts, the jurors had followed her instructions to consider each offense, element by element, testimony which Judge Bond confirmed. Thus, there is every reason to believe that inquiry of the jurors at that time would have confirmed the finality of those three verdicts.

potentially available. The verdicts entirely eliminated potential prejudice to Ross as a justification for mistrial. In addition, Ross' "valued right to have his trial completed by a particular tribunal," *Wade*, 336 U.S. at 689 – always a weighty interest – assumed enhanced significance. And the public interest shifted as well – if the verdicts were final and untainted, as the evidence would have shown that they were, then the public interest in "giving the prosecution one complete opportunity to convict those who have violated its laws," *Washington*, 434 U.S. at 509, would have been satisfied.[13]

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13 The Sixth Circuit found it not unreasonable for the state court to decline to speculate regarding what would have occurred had Judge Bond paused to reexamine her decision in light of the verdicts, see A203-05, as she plainly was empowered to do. This analysis, however, ignores the plain fact that neither speculation nor "20/20 vision of hindsight," A205, would have been implicated had Judge Bond responded appropriately to the discovery of the verdicts. The fact that she failed to notify counsel of the verdicts or to make any inquiry of record of the jurors cannot, consistently with the scrutiny demanded by the Double Jeopardy Clause, be retroactively – and circularly – used to justify refusal to consider her failure to do so in determining whether the mistrial was the product of sound exercise of judicial discretion. There was, moreover, no need for speculation. The testimony of the two jurors at the evidentiary hearing, which the state court refused to consider, provides compelling reason to believe that contemporaneous inquiry would have revealed that the verdicts were the unanimous product of fair deliberations and that the issues which prompted the foreperson's note arose only after the three verdicts had been reached, eliminating any basis for a finding, at least with respect to those three counts, that potential prejudice to the state or to the public interest

The Second Circuit was confronted with a similar situation in *Corey v. District Court*, 917 F.2d 88 (2d Cir. 1990).[14] In *Corey*, a deliberating juror asked a sheriff how far 92 feet – the distance from which the defendant shot the victim – was, and the sheriff began pacing off the distance in the view of several of the jurors. The trial judge quickly put an end to the demonstration, gave the jury a curative instruction, and sent them back to deliberate. After investigating the situation, the trial judge announced his intention to declare a mistrial; before the court and counsel could return to the courtroom, however, the jury announced that it had reached a verdict. The court declined to reconsider its mistrial order but had the verdict reported "only for the purpose of completing the record."

The Second Circuit ordered that the writ be granted, finding that manifest necessity no longer existed once the trial judge learned that the jury had reached a not guilty verdict, where, as here, the

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outweighed Ross' "valued right" to have his trial completed by that jury.

[14] While it is the holdings of this Court which ultimately control the AEDPA inquiry, decisions of the lower federal courts are not irrelevant to the issue. On the contrary, "[t]o the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." *Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002); *see Long v. Humphrey*, 184 F.3d 758, 760-61 (8th Cir. 1999).

state articulated no prejudice to its own case but cited only the potential prejudice to the defendant in agreeing with the trial judge that a mistrial was necessary. *Id.* at 89-91. Because the manifest necessity standard "eschews a mechanistic approach," the Court continued, it did not suffice that the judge had declared a mistrial before he learned of the verdict. *Id.* at 91. The Court held retrial barred by the Double Jeopardy Clause because "[t]he trial court did not exercise sound discretion when it failed to take into consideration the changed circumstances resulting from the jury's having reached a verdict of not guilty before it was discharged." *Id.* at 92.

Accordingly, when Judge Bond discovered that the jury had reached verdicts on three counts, sound discretion required her to re-evaluate matters in consultation with counsel.[15] Her failure to do so,

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One of the weaknesses of the Sixth Circuit's opinion is its implicit assumption that mistrial was an all-or-nothing proposition. Thus, while it may be true, as the Sixth Circuit suggested, that it was unlikely that the trial could be saved after Judge Bond's foray into the jury room, *see* A188-89, it does not follow that mistrial on *all* counts was the unavoidable consequence. Trial judges in Ohio are obliged tp accept partial verdicts. *See, e.g., State* v. *Walker*, 1987 WL 17921 at *2-*3 (Ohio App. 9 Dist. September 23, 1987). If the inquiry of the jurors which should have taken place at that juncture confirmed that the verdicts were, as they appeared, final, those verdicts could have been accepted and the case mistried as to the remaining offenses. While Ross' counsel did not, as the Sixth Circuit noted, ask Judge Bond to reconsider the mistrial declaration, *see* A191, the Sixth Circuit's opinion

particularly when coupled with her entire course of conduct after her oral mistrial declaration – her *ex parte* entry into the jury room, her discharge of the jury in the jury room rather than in open court, in contravention of her theretofore invariable practice, her broken promises to counsel regarding conferring with them before the jury was discharged, bringing the jury into the courtroom to be discharged, and permitting inquiry of the jury before they dispersed, and concealing the verdicts from counsel until after the jury had left the courthouse – all of which bespeak a fixed determination to see the trial at an end, crossed the line into the realm of the "irrational[]" and "irresponsibl[e]" which "cannot be condoned." *Washington*, 434 U.S. at 514. Based on all the surrounding circumstances, it could not reasonably be found that there was manifest necessity for a mistrial on the three counts as to which the jury had reached verdicts, and the state court's decision was contrary to, or an unreasonable application of, this Court's double jeopardy jurisprudence.

II.

This Court, because of the myriad diverse situations in which the decision whether to declare a mistrial arises, has declined to formulate any mechanistic standard to "channel the exercise of ... discretion according to rules based on categories of

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ignores the reality that by the time the verdicts were disclosed to counsel, the jury had already been escorted from the courthouse, extinguishing the power of the court to reconsider.

circumstances." *Jorn*, 400 U.S. at 485; *see Wade*, 336 U.S. at 691. However, as the First Circuit has phrased it, "[t]he one constant is that the actions of the trial judge in arriving at a decision to declare a mistrial have been scrutinized in an effort to ensure that a 'scrupulous exercise of judicial discretion' led to the decision." *Brady* v. *Samaha*, 667 F.2d 224, 229 (1st Cir. 1981), *quoting Jorn*, 400 U.S. at 485. *See Dinitz*, 424 U.S. at 607.

The extreme deference with which the state court reviewed the mistrial declaration in this case constituted an unreasonable application of clearly established federal law. The court applied the most deferential level of review to Judge Bond's manifest necessity determination – the broad abuse of discretion review applicable to even the most mundane of judicial decisions – rather than the more searching review called for by this Court's double jeopardy jurisprudence.[16] The court unreasonably narrowed *Jorn* to circumstances in which the trial court fails to consider *any* alternatives

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16 That the state court was conscious of its deviation from the more stringent requirements of federal double jeopardy jurisprudence is evident from its selective quotation from *United States* v. *Keene*, 287 F.3d 229, 233-34 (1st Cir. 2002), on which it purported to rely for the appropriate framework of appellate review of mistrial determinations. *See* A27-29. The most telling portion of the *Keene* analysis which the state court omitted is: "We caution however, that in cases of this genre, *review for abuse of discretion entails heightened rigor. See Jorn*, 400 U.S. at 485, 91 S.Ct. 547 (*demanding a "scrupulous exercise of judicial discretion" in this context*)." *Keene*, 287 F.3d at 233 (emphasis added).

prior to declaring a mistrial, A30,[17] and relied on the proposition, for which it cited *Washington*, 434 U.S. at 514-16, that all a trial court need do to exercise "sound discretion" is to allow the parties to state their positions, consider their competing interests, and explore *some* reasonable alternatives before declaring a mistrial. A29.

In *Washington*, however, the Court carefully explained that there was not one single standard of appellate scrutiny applicable to all mistrial declarations but that instead the degree of scrutiny required fell along a continuum from the most stringent to the most deferential, with the highest degree of deference accorded in cases in which a mistrial is declared because of the jury's inability to reach a verdict, on the theory that "the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to

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17

The Sixth Circuit perpetuated this erroneous narrowing construction in concluding that the "scrupulous exercise of judicial discretion" language of *Jorn* was not part of the Court's holding because the trial judge in that case had made no effort to exercise sound discretion at all. A193-94. *Jorn* was not, however, articulating a new standard but was instead expounding on a very old one – that propounded in *Perez* in 1824 and followed by this Court since that time. Moreover, there is no basis in the law for dividing manifest necessity cases into only two categories – those in which the trial court declares a mistrial without any apparent attempt to exercise sound discretion and all other cases and affording careful appellate scrutiny only to the former.

deliberate." *Id.* at 510 n.28. In *Washington*, in which the trial court, after much discussion and extended consideration, granted a mistrial on the motion of the state following highly prejudicial misconduct by defense counsel in his opening statement, the Court was "persuaded that, along the spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny, the difficulty which led to the mistrial *in this case* also falls in an area where the trial judge's determination is entitled to special respect." *Id.* at 510 (emphasis added). The central reason for the degree of deference accorded the mistrial declaration was the trial court's first-hand knowledge of the circumstances: he had heard "the tone of the argument as it was delivered and ha[d] observed the apparent reaction of the jurors," *id.* at 514, and was therefore "far more conversant with the factors relevant to the determination than any reviewing court could possibly be." *id.*

Here, however, Judge Bond had *no* first-hand knowledge regarding what had occurred in the jury room or who had actually said what to whom.[18] She

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Nor, unlike *Washington*, see 434 U.S. at 515-16, does the record sufficiently show that Judge Bond "temper[ed] the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Jorn*, 400 U.S. at 486. Indeed, she testified at the evidentiary hearing that she was unfamiliar with that precept and at no time during the recorded proceedings of October

did not know who the offending juror was, what the source of his knowledge of the O'Born polygraph was, whether he already knew of it at the time of the jury selection *voir dire*, whether the family circumstances to which he adverted had just arisen or were known at the time of *voir dire*,[19] or what he had actually said to other jurors. All she had to go on was the face of the note.[20] Unlike *Washington*,

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28, 2000, did she ever indicate that she had considered the double jeopardy implications of declaring a mistrial.

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There was, accordingly, *no* basis for finding, as Judge Bond did, that the juror had violated his obligation to disclose at the time of the *voir dire* either that he believed that Ross had to be guilty because O'Born had passed a polygraph or that he had family problems that could impact his ability to serve as a juror. *See* A33-34.

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The state court found the note itself a sufficient basis for the determination because "[n]otes coming from the jury room are typically taken at face value, and the information in this note was "inherently reliable." A31. For the former proposition, the court cited *State v. Sabbah*, 13 Ohio App. 3d 124 (Ohio App. 6 Dist. 1982), which in no way stands for the proposition that notes from jurors are generally to be taken at face value, as was made clear in a later case from the same court, *State v. Gonzalez*, 1999 WL 1101976 at *6 (Ohio App. 6 Dist. December 3, 1999), in which the court ruled that the trial court abused its discretion in taking the note as true without further inquiry. For the second proposition, the court cited no authority, and Ross knows of no authority for the proposition that notes indicating juror misconduct are "inherently reliable."

It is also worth noting that if the note were taken at face value, it also included the information that, as far as the jury was concerned, the problem was confined to one juror,

therefore, she did not have a first-hand basis for evaluating whether a mistrial was so manifestly necessary that Ross' "valued right to have his trial completed by [that] particular tribunal," *Wade*, 336 U.S. at 689, should give way and he should again be forced to run the gantlet of death.[21]

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that the rest of the jurors believed that they could continue to deliberate fairly and impartially, and that they wished to continue to deliberate with the substitution of an alternate. As to the latter alternative, the state court was incorrect in stating that substitution of an alternate was not an alternative available under state law, App. 39-40; on the contrary, an alternate could have been seated with Ross' consent. *See United States v. Cencer*, 90 F.3d 1103, 1106-09 (6th Cir. 1996); *State v. Girts*, 121 Ohio App. 3d 539, 556-58 (Ohio App. 8 Dist. 1997). These are all largely matters of state law, but they provide added context for the overall unreasonableness of the state court's decisionmaking in this case.

21 At least three other important factors also distinguish this case from *Washington* and render unreflective application of its highly deferential standard of review unreasonable. First, *the mistrial was declared here during deliberations after a* lengthy trial, a point in the trial process when the defendant's valued interest in having his trial completed before that particular jury is at its zenith, and not, as in *Washington*, at the very outset of the case. Second, the trial court in *Washington* was faced with only two alternatives: give a curative instruction and permit the trial to proceed or declare a mistrial. It is one thing to accord a high level of deference to a trial judge's conclusion, based upon his observation of exactly what occurred and its apparent effect, and quite another to extend that same degree of deference to circumstances such as those present in this case, where the court lacked such first-hand knowledge and the alternatives open to it were considerably more complex, varied, and nuanced. Third, the

The broad degree of deference which the Court indicated should be applied to the mistrial determination in *Washington* cannot reasonably be extended to *all* manifest necessity determinations or even all manifest necessity determinations in which the issue is possible juror bias. To do so would be contrary to this Court's repeated admonition that no categorical approach to mistrial declarations is either feasible or desirable. Yet this what the state court did and what the Sixth Circuit did as well in concluding that the state court decision did not reflect an unreasonable application of the controlling double jeopardy jurisprudence of this Court. For example, the Sixth Circuit declined to apply the *Perez/Jorn* "scrupulous exercise of judicial discretion" standard because "[c]areful reading of *Washington*, which contains more explicit instruction on the governing standards and represents a superior embodiment of clearly established federal law, reveals that a reviewing court is obliged to satisfy itself, *with great deference to the trial judge's assessment of possible juror bias*, that the trial judge exercised 'sound discretion." App. 195. *See also* App. 207 (referring to state court's deference as "consistent with *Washington*'s insistence on appellate deference to the trial judge's evaluation of *possible* juror bias" (emphasis in original). The Sixth

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basis for the mistrial in this case was in no sense the fault of the defense, and hence the concerns which the Court expressed in *Washington* regarding the "unfair advantage" which a stricter standard of review might give "unscrupulous defense counsel," 434 U.S. at 513, are wholly absent.

Circuit's generalization of *Washington* to the very different circumstances of this case in turn led it to subject Ross' claims to two separate "lenses of deference," A187-91: the first, the deference required by §2254, and the second, the deference it erroneously believed was required by *Washington*. In upholding the state court's decision as not an unreasonable application of clearly established federal law, therefore, the Sixth Circuit engaged in precisely the mechanistic, categorical approach – under which *all* manifest necessity determinations which spring from possible juror bias are to be afforded the utmost deference – that this Court had long abjured.

CONCLUSION

For all the foregoing reasons, this Court should grant a writ of certiorari in this case.

Respectfully submitted,
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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO, Plaintiff	)	CASE NO. CR 99 05 1098
-vs-	)	JUDGE JOSEPH CIRIGLIANO
DENNY ROSS, Defendant	)	

Defendant Denny Ross was arrested on May 27, 1999, and charged with aggravated murder, rape, kidnaping, tampering with evidence and abuse of a corpse. In October 1999, two specifications were added to the indictment making the defendant eligible for the death penalty.

Trial began in Summit County Court of Common Pleas, with jury selection on September 28, 2000. Prior to seating and swearing in the jury on October 17, 2000, the court twice asked the defendant if he wished to strike the existing jury pool and start the trial proceedings over at a later date. Both times the defendant declined.

Opening arguments at trial were presented on October 17, 2000. The prosecution rested its case on October 25, 2000. The kidnaping offense and the kidnaping special circumstance were dismissed by the court at the close of the prosecution's case-in-chief pursuant to Ohio Criminal Rule 29. The defense then rested without calling any witnesses.

The jury was instructed on October 26, 2001, and began its deliberations at 9:00 a.m. on Friday, October 27, 2000.

Prior to a noon lunch break on Saturday, October 28, 2000, the second day of the jury

deliberations, unanimous verdicts of not guilty on the charges of aggravated murder, murder, and rape were reached by the jury. Each of the twelve jurors signed each of the three not guilty verdicts and the three not guilty verdicts were placed in an manila envelope marked "verdicts" which had been provided by the court. The court and counsel did not become aware of these verdicts until later in the day.

After lunch, when the jury resumed its deliberations, the jury foreperson composed a note which he sent to the court. At about 2 p.m. on Saturday, October 28, 2000, the court informed counsel for both the State and defendant that "the jury had a question." The note composed by the jury foreperson stated in its entirety:

There is a concern about a Juror. I was approached by a spokesperson for 4 other Jurors. From comments made by this Juror these 4 Jurors feel that he is agreeing with the group to expedite this process. I was told by these Jurors that they (*sic*) following comments were made. "No. 1, we need to get this done today." "No. 2, why are we even discussing this." He has stated all along that he believes one thing but has all too quickly changed his vote to go along with the group. This morning this Juror stated to me that we need to finish this today as he will be leaving after today because he has a problem at home but he did not want to put us in that position. To another Juror he made the comment that he knows that Brad O'Born was innocent because he passed a polygraph test so Denny Ross had to be guilty. I have been asked if this Juror can be released so that he may tend to his affairs at home,

and we can have an impartial and fair jury.[1]

The foreperson's note clearly indicated that deliberations on the remaining counts could continue with an alternate juror. The hearsay information concerning a possible polygraph test taken by Brad O'Born contained in the foreperson's note posed a risk of prejudice to the defendant; it did not prejudice the state.

The events and conversations described in the jury foreperson's note and the creation of the notes occurred after the three not guilty verdicts were signed by each of the twelve jurors.

An unrecorded discussion among the court and counsel ensued in the court's chambers after the arrival of counsel. Various suggestions were made to the court regarding the proper handling of the foreperson's note. The alternatives raised in chambers included: (1) an alternate juror could be seated; (2) the trial judge could voir dire the jury or the problem juror; (3) the jury could continue to deliberate, with the understanding that if guilty verdicts were rendered, the defense would request a mistrial; (4) the court could declare a mistrial with prejudice. Also during this discussion, it was agreed that under Ohio law partial verdicts could be returned.

After the in-chambers discussion, recorded proceedings resumed in the courtroom. The court

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[1] At trial the defense identified Brad O'Born as the boyfriend of the victim and as a possible suspect in her death. No evidence was introduced at trial that O'Born had ever taken a polygraph exam.

asked, on the record, if the parties would consent to a mistrial pursuant to Ohio R.C. section 2945.36(D).[2] The prosecutors stated that they "believe in the *defendant's right to a fair trial* and we would consent" to the discharge of the jury. The prosecutors made no mention of any perceived prejudice to the State.

Before directly responding to the court's query, defense counsel requested that the court rule on its previously filed motion for mistrial with prejudice based upon the prosecutor's alleged numerous misrepresentations during closing argument. The court refused to consider that motion claiming that it was "not ripe." Next, defense counsel requested that "the jury be instructed to continue to deliberate, a verdict be rendered with the defense option of a mistrial if the decision were to be unfavorable." The theory for that defense request was that the extra-judicial evidence concerning Brad O'Born possible polygraph exam that existed in the jury room was evidence that was only prejudicial to the defendant and hence defense counsel believed any not guilty verdict would be untainted. The trial court denied that motion because, in its view, it was "fundamentally unfair to the State." The court never indicated how the extra-judicial information in the foreperson's note about Brad O'Born, which to the court's knowledge was communicated to only one other juror and the foreperson, prejudiced the State. The State's position

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2 Ohio R.C. 2945.36(D) provides that the court may discharge a jury without prejudice to the prosecution by the consent of the prosecuting attorney and the defendant.

was that the prejudice, if any, from the juror's comments about O'Born's possible polygraph results only harmed the defendant. The defendant next requested a mistrial with prejudice. That motion was denied by the court.

Defense counsel then responded to the court's initial query, formally opposing a mistrial without prejudice pursuant to Ohio R.C. section 2945.36(D). Counsel for the defendant stated: "He (the defendant) does not wish to have a mistrial in this case." The trial court then inquired directly of Mr. Ross whether he would consent to the discharge of the jury on the basis of the court's perception of "misconduct and corruption of at least one of the jurors in this trial." The defendant personally rejected a mistrial stating, "I don't want a mistrial...." The court then stated to Mr. Ross "that at least one juror believes you're guilty based on [no] evidence that was presented during this trial. Do you understand that?" Mr. Ross replied: "I understand, your Honor." Mr. Ross remained opposed to the mistrial.

The court then stated that it believed that the unidentified juror discussion in the foreperson's note "ha[d] impeded full and fair deliberations...and there's no way that the bell has struck I can unring....I don't believe that seating an alternate (juror) at this point in time could undo the damage that's been done to the deliberations in this case." The court had no evidence of any damage to the deliberations because no further investigation regarding the jury foreperson's note was conducted by the court. The court asked the parties whether they wished to voir dire "the juror who purportedly has made these statements." The prosecutor stated, "We are not in favor of voir dire during

deliberations." Defense counsel responded that they had "the same position;" they did not wish to voir dire the jurors during deliberations. When the court indicated that "this is the time," defense counsel reaffirmed that he did not [want] to conduct voir dire of the juror in question "during their deliberations. I think that would have a prejudicial impact on the deliberations." In response, the court indicated: "I will permit inquiry of the jury after a decision has been made by the court if the jury is to be discharged. Certainly that will be done."

The court then *sua sponte* declared a mistrial pursuant to Ohio R.C. section 2945.36(A), which permits discharging s jury when there is "corruption of a juror." The court stated that "this jury cannot render a fair and impartial verdict" because of the extra-judicial information the jury had received about O'Born's possible polygraph results. The court further indicated to counsel that it would "summons this panel and they will be discharged..." Finally the court indicated to the State and to the defense that it would "further allow inquiry to be made of this jury once they have been discharged."

The court indicated it would discuss this inquiry of the jury "with (counsel) in chambers before they (the jury) are discharged." The court then declared itself adjourned until the next court day, Monday, October 30, 2000.

With that announcement by the court, the proceedings on the record ended. However, immediately after the court adjourned, without comment to anyone, the judge left the bench, briefly went into her chambers, then entered the jury room. No court reporter or counsel were present in the jury room at any time. The judge's statements to

the jury while in the jury room were not recorded. While in the jury room the trial judge told the jury that a mistrial had been declared and that they were discharged. Counsel, who were not present, had no opportunity to object to the judge's conduct. The jurors were shocked and "extremely upset."

While the judge was in the jury room she indicated to the jurors that they could speak to her individually and privately in her chambers if they wished. When the judge left the jury room, five individual jurors went to the judge's chambers. The other seven jurors remained in the jury room. One at a time, the five jurors individually met with the judge in chambers. At least one juror, Melissa Ann Gribek, the second juror to see the judge in her chambers, told the judge that the jury had unanimously found Mr. Ross not guilty of the aggravated murder, murder and rape charges and that verdicts had been signed to that effect. Ms. Gribek expressed concern for Mr. Ross and asked the judge what would happen to him. The judge told Ms. Gribek that there was certain evidence that wasn't introduced at trial and that it would be presented at another trial.

All of the jurors remained in the courthouse, either in the jury room or in the judge's chambers when the judge was informed by Ms. Gribek that there were three signed not guilty verdicts. The jurors continued to remain in the courthouse and under the control of the court for some time after the court learned that three not guilty verdicts had been signed by all twelve jurors. At no time while the jurors were still present in the jury room, the courtroom, or the judge's chambers, did the judge ever inform counsel for either party that three not guilty verdicts

had been signed by each member of the jury.

While the judge was meeting with the five jurors in chambers, counsel for the defendant, Mr. Chesnoff, asked the bailiff if he could speak to the judge. The bailiff informed Mr. Chesnoff that the jurors wanted to speak with the judge confidentially and that he would have to wait.

After each of the five jurors spoke to the judge in chambers, they returned to the jury room where the remaining seven jurors were waiting. The manila envelope marked "verdicts" containing the three signed not guilty verdicts had by this time been removed from the jury room by the bailiff. It was delivered to the court's chambers and handed to the judge. All of the jurors remained in the jury room for another one-half hour or more while arrangements were made for them to leave. They left the courtroom as a group in the company of bailiffs and sheriffs due to the large number of television cameras and reporters that were waiting outside the courtroom.

After the judge spoke to the five jurors in chambers and prior to meeting with counsel and disclosing the fact that verdicts had been rendered the judge met with a reporter from the Akron Beacon Journal.

After the judge finished speaking with the reporter, the judge met with Mr. Pancer and prosecutor John Greven in chambers. It was only then that she disclosed that the jury had returned three not guilty verdicts. By this time, the jurors had left the courthouse and we[re] no longer under the control of the court.

At the Motions Hearing, the judge testified that she had represented to counsel that she would

meet with counsel in chambers prior to discharging the jury so that they could discuss the process of interviewing the jurors. However, no such in-chambers meeting with counsel ever took place prior to the discharge of the jury. At the Motions Hearing, the judge further testified that she told counsel she was going to summon the jury and discharge them. However, she did not summons the jury and discharge them in open court. In her 12 year tenure as a judge, this was the first time the judge ever failed to discharge a jury in open court. Counsel were thus unable to interview the jurors even after the court had discharged them.[3]

The judge testified that one of the concerns raised in the foreperson's note, the fact that the problem juror had a pressing problem to attend to and therefore did not want to deliberate further, could be solved by seating an alternate juror under the right circumstances. She also stated that the fact that a single juror would not deliberate in and of itself did not necessitate a mistrial.

The judge testified that one alternative she considered to declaring a mistrial was a voir dire of the jury panel. She testified that she wanted to voir dire the jury for the purpose of avoiding the necessity of a mistrial. The judge acknowledged that the statement in the note about Brad O'Born's possible polygraph results was at minimum second-hand hearsay, and could have been "fourth-hand or fifth

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During the trial proceedings, the jurors were identified to the parties only by a number. Only the court knew the jurors' names. Once the jurors were discharged and left the courthouse it was not possible for counsel to contact the jurors.

or sixth" hand hearsay, or the note could have been a hoax. The judge also acknowledged that the juror could have been speculating about possible polygraph results. The judge further testified that she could have questioned the problem juror as to how he/she obtained the information regarding the possible polygraph results. However, the judge took none of these steps.

The judge testified that one of the alternatives to declaring a mistrial, and the alternative that the defense requested, was to permit the jury to continue to deliberate, with the understanding that if the jury returned guilty verdicts, the defense would move for a mistrial based on the prejudicial statement of the juror about O'Born's possible polygraph results.

The judge testified that she never inquired of the jury whether verdicts were reached before the issues discussed in the note arose.

The judge testified that if she had told defense counsel about the verdicts before the jurors had left the building and the control of the court, defense counsel certainly would have asked that the verdicts be recorded.

The judge testified that she was not familiar with the concept that even if a defendant's prospects of an acquittal are prejudiced by some judicial or prosecutorial error, a defendant may still elect to have the matter tried by the seated jury.

On Monday, October 30, 2000, when the recorded proceedings commenced again, the court indicated that it would set a new trial date of January 8, 2001, and that Mr. Ross would again face the death penalty. Mr. Ross indicated that he would be filing a motion to recuse Judge Bond as she was

a witness to all the events of October 28, 200[0] and subsequently she was recused from this case.

On November 9, 2000, Ross filed a number of motions in the Summit County Court of Common Pleas including: Defendant Ross' Motion to Perfect the Three Unanimous Verdicts Returned By the Jury on October 28, 2000; Defendant Ross' Motion to Bar Retrial on this Case on Double Jeopardy grounds; Defendant Ross' Renewed Motion for Judgment of Acquittal; and Defendant Ross' Motion to Set Reasonable Bail. All of these motions, except that seeking reasonable bail, requested an evidentiary hearing.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is applicable to the states through the Fourteenth Amendment and provides "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Benton v. Maryland* (1969) 395 U.S. 784. Section 10, Article 1, Ohio Constitution states "...no person shall be twice put in jeopardy for the same offense."

The Double Jeopardy clauses of the Ohio and United States Constitution serve various purposes. The clauses preclude the State from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *United States v. Dinitz* 424 U.S. 600, [606] (1976), *quoting Green v. United States*, 355 U.S. 184 (1957). Double jeopardy principles also protect defendants in cases "in which a judge exercises authority to help the prosecution, at a trial in which its case is going badly, by affording at

another, more favorable opportunity to convict the accused." *Gori v. United States*, 367 U.S. 364, 369. It also protects the defendant's "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter* (1940), 336 U.S. 684, 689. Even if the first trial is not completed, a second prosecution may be grossly unfair because "it increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted...[A]s a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona v. Washington*, 434 U.S. 497, 503-505 (1978). The protections afforded by the Double Jeopardy Clause confer upon a defendant the right to have his trial completed by a particular tribunal. *Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982); *Arizona v. Washington*, 434 U.S. 497, 503-504 (1978).

Jeopardy attaches at the time the jury is sworn. *State v. Calhoun* (1985), 18 Ohio St. 3d, 373 relying on *Crist v. Bretz* (1978) 437 U.S. 28, see *State v. Glover*, 35 Ohio St. 3d 18 (1988).

When a mistrial has been declared without the defendant's request or consent, double jeopardy prohibits a retrial if there was no manifest necessity for ordering a mistrial or the ends of public justice would otherwise be defeated. *Id.* at 505-506; *State v. Widner* (1981), 68 Ohio St. 2d 188, 189; *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824); *Corey v. District Court of Vermont, Unit #1, Rutland Circuit*, 917 F.2d 88 (1990). However, the Supreme Court has warned that in view of a defendant's weighty double jeopardy interests, the power to declare a

mistrial "ought to be used [only] with the greatest caution, under urgent circumstances, and for very plain and obvious causes, and, in capital cases especially, the courts should be extremely careful with how they interfere with any chance of life, in favor of the prisoner." *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824).

The Ohio Supreme Court has applied the following criteria in determining whether a trial judge properly exercised his or her discretion in declaring a *sua sponte* mistrial: (1) did "manifest necessity" or a high degree of necessity exist for ordering a mistrial; (2) did reasonable alternatives to declaring a mistrial exist; and (3) is the public interest in fair trial designed to end in just judgments best served by ordering a mistrial? *State v. Widner* (1981), 68 Ohio St. 2d 188, 190; *and see State v. Schmidt* (1979), 65 Ohio App. 2d 239, 244-45. An important consideration is that "the public has an interest in the prompt and efficient dispatch of justice." *Widner*, 68 Ohio St. 2d at 191. "[T]he limited public interest in having a trial free of all possible taint, whether prejudicial or not, by itself cannot overcome [a defendant's] constitutionally protected 'valued right to have his trial completed by a particular tribunal.'" *Corey v. District Court of Vermont, Unit #1, Rutland Circuit*, 917 F.2d 88, 91 (1990).

The burden is on the prosecution to establish that manifest necessity existed. *Arizona v. Washington*, 434 U.S. at 505; *Glover v. McMackin*, 950 F.2d 1236, 1242 (6th Cir. 1991). The state must show that the trial judge had no alternative to the declaration of a mistrial. *See, e.g., Love v. Morton*, 112 F.3d 131, 136 (3d Cir. 1997). Any doubt must be resolved in favor of the defendant. *Downum v.*

United States, 372 U.S. 734 (1963).

In *State v. Phillips* (1995), 74 Ohio St. 3d 72, the Ohio Supreme Court set forth the procedure and applicable law a court must follow when an allegation is made that an improper communication has occurred with a juror. The court held "When a trial court learns of an improper outside communication with a juror, it must hold a hearing to determine whether the communication biased the juror, *Smith v. Phillips* (1982), 455 U.S. 209, 215-216; *Remmer v. United States* (1954), 347 U.S. 227, 229-230.

When faced with misconduct that has the potential of influencing jury deliberations, and where that misconduct does not prejudice the state, the Court must consider any verdict reached by the jury in its determination of whether the misconduct affected the jury and whether manifest necessity exists. The failure to take into account the jury's verdict is an abuse of discretion. *Corey v. District Court of Vermont, Unit #1, Rutland Circuit*, 917 F.2d 88, 92 (1990).

The decision to order a mistrial *sua sponte*, over the objection of defense counsel requires "scrupulous exercise of judicial discretion" and careful consideration and solicitude for the serious consequences attendant to mistrials. *Perez, supra; Johnson v. Karnes*, 198 F.3d 589, 595-96 (6th Cir. 1999), citing *Perez, supra*, and *Jorn, supra; Malinovsky v. Court of Common Pleas of Lorraine County*, 7 F.3d 1263 (1993). "A precipitate decision, reflected by a rapid sequence of events culminating in a declaration of mistrial, would tend to indicate insufficient concern for the defendant's constitutional protection." *Brady v. Samaha*, 667 F.2d

224, 229 (1st Cir. 1981); cited in *United States v. Dixon*, 913 F.2d 1305, 1311 (1990).

A trial court has a duty to investigate and must possess reliable first-hand knowledge of the facts underlying a mistrial determination – hearsay is not sufficient. *Poage v. State* 3 Ohio St. 229, 239-40 (1854); *State v. Gonzalez*, (Dec. 3, 1999), Huron County App. No. H-99-002, unreported, 1999 WL 1101976. The trial court has a duty to attempt to cure or otherwise determine the effect of the purported tainted evidence on the jury prior to declaring a mistrial. *State v. Morgan* (1998) 129 Ohio App. 3d 838, 843.

A trial judge commits an abuse of discretion where it fails to conduct a "scrupulous" search for alternative remedies to the perceived problem. *Jorn v. United States*, 400 U.S. 470 (1971).

A trial judge commits and abuse of discretion where it fails to investigate allegations of jury taint, fails to attempt to cure or otherwise determine the effect of the purported taint on the jury prior to declaring a *sua sponte* mistrial. *Poage v. State* 3 Ohio St. 229, 239-40 (1854); *State v. Gonzalez*, (Dec. 3, 1999), Huron County App. No. H-99-002, unreported, 1999 WL 1101976; *State v. Morgan* (1998) 129 Ohio App. 3d 838, 843.

The crucial inquiry is: did the trial court adequately consider alternatives less drastic than the deprivation of the defendant's "valued right" to have his trial completed by that particular jury? *Johnson v. Karnes*, 198 F.3d 589, 595 (6th Cir. 1999).

In Ohio, a mistrial is not considered necessary where a jury improperly learns that the defendant has taken and failed a polygraph examination, see *State v. Holt*, 17 Ohio St. 2d 81 (1969), nor is a mistrial

necessary where a juror learns that a non-party, non-witness or other possible suspect has taken a polygraph examination. *See State v. McAfee* (December 26, 1991), Guernsey App. No. CA-91-20, unreported, 1991 Ohio App. LEXIS 6338.

Where the court does not have "reliable firsthand knowledge" of the events giving rise to its *sua sponte* declaration of mistrial, the declaration of mistrial constitutes a failure to exercise sound discretion, is error and contrary to law. *State v. Widner* (1981), 68 Ohio St. 2d 188, 189; *State v. Gonzalez*, (Dec. 3, 1999), Huron County App. No. H-99-002, unreported, 1999 WL 1101976 at *5.

At the time that the trial judge declared a mistrial in this case, the judge had failed to scrupulously consider and investigate the alternatives to a mistrial. The judge had no first-hand knowledge on which to base its conclusion that the jury was tainted and incapable of completing its deliberations. Relying solely on the information contained in the jury foreperson's note, the trial judge possessed second and third-hand knowledge that one problem juror existed; that the juror had communicated the O'Born polygraph information to one other juror, who in turn communicated that information to the foreperson; that the same problem juror had communicated to four jurors that he had personal matters to attend to and needed to "get this [deliberation] done today;" and that the foreperson believed that the jurors could continue to deliberate as "an impartial and fair jury." The foreperson requested that the problem juror be "released." The trial court failed to make any inquiry of the jurors as to the information contained in the foreperson's note and failed to provide the jury with

any curative instruction. Based on the information known to the trial judge at the time she declared a mistrial, it was not possible to know if the jury was tainted and if it was tainted, whether that taint was material and incurable. The trial judge failed to adequately consider alternatives such as dismissing the problem juror, seating an alternate, providing curative instructions, and permitting the deliberations to continue.

The trial judge acted precipitately in declaring the mistrial. The issue of the problem juror arose late on a Saturday afternoon. Rather than declare a mistrial at that time, the court could have excused the jury for the night to permit the court additional time to consider the problem and possible alternatives. Instead, the court foreclosed any further exploration of the matter. The court did not discuss with counsel the procedure for an inquiry of the jury after discharge, which it stated to counsel it would discuss with them before the jury was discharged. The court did not summons the jurors into open court in order to discharge them. Instead, the jurors were discharged in the jury room outside the presence of counsel, courtroom personnel, or a court reporter. "A precipitate decision, reflected by a rapid sequence of events culminating in a declaration of mistrial, would tend to indicate insufficient concern for the defendant's constitutional protection." *Brady v. Samaha*, 667 F.2d 224, 229 (1st Cir. 1981); cited in *United States v. Dixon*, 913 F.2d 1305, 1311 (1990).

In the present case there existed no manifest necessity for declaring a mistrial. Reasonable alternatives to mistrial existed and the public interest in fair trials designed to end in just judgments was

not met by the trial judge's declaration of mistrial. The trial court abused its discretion in declaring a mistrial because it failed to investigate the information set forth in the jury note, it failed to explore alternatives to declaring a mistrial, it failed to take into consideration the verdicts that had been reached by the jury, it failed to ascertain whether any prejudice existed as a result of the information relayed in the foreperson's note, it failed to attempt to cure any taint which may have existed, it acted precipitately in the declaration of a mistrial, and it failed to duly consider the defendant's right to have his trial completed by a particular tribunal, especially in light of the fact that this is a capital case. *See United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824).

For the reasons stated herein, Defendant Ross' motion to bar retrial on double jeopardy grounds is granted. In view of this Court's order upholding the defendant's double jeopardy claims, this Court declines to rule on any of the other motions presently pending before this Court.

IT IS SO ORDERED.

/S/ Joseph E. Cirigliano
JUDGE JOSEPH CIRIGLIANO

STATE OF OHIO) IN THE COURT OF APPEALS
)ss: NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT)

STATE OF OHIO
Appellant

v.

DENNY ROSS
Appellee

C.A. No. 20980

APPEAL FROM THE JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 99 05 1098

DECISION AND JOURNAL ENTRY

Dated: December 31, 2002

This cause was hear upon the record in the trial court. Each error has been reviewed and the following disposition is made:

CARR, Judge.

{¶ 1} Appellant, the State of Ohio, appeals from a judgment of the Summit County Court of Common Pleas that granted the motion of appellee, Denny Ross, to bar his retrial on charges including aggravated murder following the trial court's declaration of a mistrial. This Court reverses and remands.

{¶ 2} On June 10, 1999, Denny Ross was indicted on charges of aggravated murder, rape, kidnapping, tampering with evidence, and gross abuse of a corpse, stemming from the murder of eighteen-year-old Hannah Hill. The indictment was later amended to included capital murder specifications. A jury trial commenced on September 28, 2000. On Saturday, October 28, 2000, while the jury was deliberating, the trial judge received a note from the foreperson of the jury, which was read on the record:

{¶ 3} "There is concern about a juror. I was approached by a spokeperson for four other jurors. From comments made by this juror these four jurors feel that he is agreeing with the group to expedite this process. I was told by these jurors that the following comments were made.

{¶ 4} "No. 1, we need to get this done today.

{¶ 5} "No. 2, why are we even discussing this. He has stated all along that he believes one thing but has all too quickly changed his vote to go along with the group. This morning this juror stated to me that we need to finish this today as he will be leaving after today because he has a problem at home but he did not want to put us in that position.

{¶ 6} "To another juror he made the comment that he knows that Brad O'Born was innocent because he passed a polygraph test so Denny Ross had to be guilty.

{¶ 7} "I have been asked if this juror can be released so that he may attend to his affairs at home and we can have an impartial and fair jury."

{¶ 8} The trial judge met in chambers with

counsel for the defense and the prosecution to provide each side an opportunity to be heard on the issue. Although the initial proceedings in chambers were not recorded, the parties reconvened later that day and recounted, on the record, what had been discussed in chambers. The trial judge expressed her view that the note evidenced "the misconduct and corruption of at least one of the jurors in this trial." Neither party disputed that the note provided evidence that information not presented at trial had invaded the jury room during deliberations nor did either party contest the authenticity of the note.

{¶ 9} The trial judge offered each party the opportunity to voir dire the jury foreperson and the juror who allegedly made the statements. Both parties declined the opportunity and, in fact, firmly objected to any voir dire of the jurors. The trial judge asked the parties whether they would consent to the discharge of the jury. The State consented, but Ross did not. Instead, Ross asked the trial court to consider one of the following alternatives: (1) grant him a mistrial with prejudice, based on alleged misconduct by the State during closing argument and at other points during the trial;[1] or (2) allow the jury to continue deliberating, but grant a mistrial if the jury returned a guilty verdict. The trial judge also

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[1] This Court will not address this alternative on appeal because Ross did not argue it as a basis to bar his retrial. Consequently, he waived any alleged error in the denial of a mistrial based on alleged misconduct by the State.

considered seating an alternate juror for the complaining juror, although it is not clear from the record who proposed that alternative to declaring a mistrial.

{¶ 10} The trial judge considered and rejected the alternatives proposed by defense counsel. She also rejected the alternative of seating an alternate juror. She explained her concerns that at least one juror was considering evidence of guilt that had not been presented at trial and that the same juror was refusing to deliberate in good faith. Based upon those concerns and "upon the face of the communication given by Juror No. 4, and since neither party wishes additional inquiry to be made by the Court in regard to a voir dire of any of the potential jurors, [the] Court finds that the jury is unable to fulfill the obligations required by law, to fully and fairly consider the evidence and render a verdict based upon the evidence and the law in this case." The trial judge verbally declared a mistrial and, on November 2, 2000, journalized her declaration of a mistrial. That same day, the trial judge set a new trial date of January 9, 2001.

{¶ 11} Facts were discovered after the trial court declared a mistrial that, unfortunately, have become the focus of Ross and others who look back at the mistrial decision in hindsight. Of particular interest to Ross and others is the fact that, unbeknownst to the trial judge or the parties at the time a mistrial was contemplated and declared, the jury had completed three verdict forms, finding Ross "not guilty" of the most serious charges against him.

{¶ 12} On November 9, 2000, Ross filed, among

other things, a motion to bar retrial on the grounds of double jeopardy. In his motion, Ross requested that the trial court hold an evidentiary hearing on the issue. On November 20, 2000, Ross filed a petition with the Ohio Supreme Court to disqualify the trial judge. The Supreme Court granted Ross's petition, concluding that there was a significant likelihood that the trial judge would be called to testify about her mistrial decision.

{¶ 13} A visiting judge was assigned to the case. On May 22, 2001, an evidentiary hearing was held on Ross's motion to bar retrial. At the hearing, evidence was presented concerning what the trial judge considered prior to declaring a mistrial. Much of the evidence presented, however, focused on a hindsight analysis of the thought processes of the trial judge and information that was not before the trial judge at the time she made her decision. Based upon the evidence presented, the visiting judge found that there had been no manifest necessity for a mistrial and that, therefore, the original trial judge had abused her discretion by declaring a mistrial.[2]

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[2] The visiting judge, who sat as a trial judge in this case, seemed to view his role as that of an appellate judge, reviewing the original trial judge's decision for an abuse of discretion. Pursuant to Section 4(B), Article IV of the Ohio Constitution, a court of common pleas has no authority to review another decision of the court of common pleas. The visiting judge's role here was to determine whether there had been a manifest necessity to declare a mistrial, not whether the original trial judge had abused her discretion.

Therefore, he held that a retrial of Ross was barred by his constitutional protection against double jeopardy. The State appeals and assigns two errors.

ASSIGNMENT OF ERROR I

{¶ 14} "THE SECOND TRIAL COURT'S DISMISSAL ON DOUBLE JEOPARDY GROUNDS IS A NULLITY BECAUSE THE SECOND TRIAL COURT ACTED WITHOUT JURISDICTION AND IN VIOLATION OF THE OHIO CONSTITUTION WHEN IT REVIEWED AND REVERSED THE DISCRETIONARY DECISION OF THE FIRST TRIAL COURT."

{¶ 15} The State first contends that the trial court was without jurisdiction to rule on the motion to bar retrial. Its first argument is that a court of common pleas does not have jurisdiction to review another court of common pleas. Although it is true that the visiting judge did not have appellate jurisdiction, it was appropriate for him to determine whether double jeopardy barred retrial of Ross. The motion to bar retrial was heard by the same court of common pleas; only the judge had been changed.

{¶ 16} Next, the State contends that the motion to bar retrial was essentially a motion for reconsideration of a final trial court judgment, which is a nullity. See *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 379, 423 N.E.2d 1105. The State cites no authority to support this proposition and this Court knows of none. The issue of double jeopardy following a trial court's sua sponte declaration of a mistrial is routinely raised through a motion to bar retrial. See, e.g., *State v. Glover* (1988), 35 Ohio St.3d

18, 517 N.E.2d 900; *United States* v. *Jorn* (1971), 400 U.S. 470, 475-477, 91 S.Ct. 547, 27 L.Ed.2d 543. The State has failed to convince this Court that the trial court was without jurisdiction to rule on the motion. The first assignment of error is overruled.

ASSIGNMENT OF ERROR II

{¶ 17} "THE SECOND TRIAL COURT'S DISMISSAL ON DOUBLE JEOPARDY GROUNDS IS A NULLITY BECAUSE THE FIRST TRIAL COURT ACTED WITHIN [ITS] DISCRETION BY DECLARING A MISTRIAL *SUA SPONTE*."

{¶ 18} The State contends that the visiting judge erred in finding that there was no manifest necessity for declaring a mistrial. Consequently, the State contends that the trial court erred in holding that retrial of Ross was barred on double jeopardy grounds. This Court agrees.

{¶ 19} This Court must begin by stressing that a record was made of the discussions between the original trial judge and the parties prior to the judge declaring a mistrial on October 28, 2000. Along with his motion to bar retrial and the other motions that Ross filed, however, he requested that the court hold an evidentiary hearing. The State did not oppose that request and, consequently, the visiting judge held an evidentiary hearing on May 22, 2001. At the hearing, Ross presented evidence of many facts that were unknown to the trial judge and the parties at the time the mistrial was declared. He questioned the trial judge, requiring her to defend, or allowing her to justify, in hindsight, her decision to declare a mistrial.

{¶ 20} This Court has found no authority for reviewing the propriety of a mistrial decision based on an evidentiary hearing held nearly seven months after the decision was made. On the contrary, the mistrial decision should be evaluated on the record that was prepared at that time. See *Hines v. State* (1873), 24 Ohio St. 134, paragraph two of the syllabus; *State v. Morgan* (1998), 129 Ohio App.3d 838, 842, 719 N.E.2d 102. Consequently, this Court confines its review to the record of October 28, 2000. Although it is difficult to ignore the facts that were later discovered, in particular the three "not guilty" verdict forms, this Court, as a matter of law, must not consider these facts. Facts unknown to the trial judge and the parties simply cannot enter into the review of the trial court's mistrial decision.

{¶ 21} Next, this Court must look to the standard of its review. "Where the trial judge *sua sponte* declares a mistrial, double jeopardy does not bar retrial unless the judge's action was instigated by prosecutorial misconduct designed to provoke a mistrial, or the declaration of a mistrial constituted an abuse of discretion." (Emphasis sic.) *State v. Glover* (1988), 35 Ohio St.3d 18, 517 N.E.2d 900, syllabus.

{¶ 22} In determining whether the trial court properly exercised its discretion, reviewing courts look to whether (1) "there [was] a 'manifest necessity' or a 'high degree' of necessity for ordering a mistrial, or (2) 'the ends of public justice would otherwise be defeated.' " *State v. Widner* (1981), 68 Ohio St.2d 188, 189-190, 429 N.E.2d 1065, citing *Arizona v. Washington* (1978), 434 U.S. 497, 98

S.Ct. 824, 54 L.Ed.2d 717. The Ohio Supreme Court, recognizing that there are a variety of circumstances in which a mistrial may arise, "has been reluctant to formulate precise, inflexible standards. Rather, the court has deferred to the trial court's exercise of discretion in light of all the surrounding circumstances[.]" *Widner*, 68 Ohio St.2d at 190, 429 N.E.2d 1065. See, also, *United States v. Jorn* (1971), 400 U.S. 470, 480, 91 S.Ct. 547, 27 L.Ed.2d 543.

{¶ 23} The *Glover* court emphasized that a defendant's right is not absolute; rather, it must be balanced with the State's competing interests: "the defendant's right to have the charges decided by a particular tribunal is weighed against society's interest in the efficient dispatch of justice." 35 Ohio St.3d at 19, 517 N.E.2d 900, citing *State v. Calhoun* (1985), 18 Ohio St.3d 373, 376, 481 N.E.2d 624, and *United States v. Scott* (1978), 437 U.S. 82, 92, 98 S.Ct. 2187, 57 L.Ed.2d 65. This balance does not always tip in favor of the defendant's constitutional right; rather, "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter* (1949), 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974.

{¶ 24} Although the judgment that the State has appealed is the trial court's February 15, 2002 order barring retrial, the focus of this Court's review remains on the trial court's prior order declaring a mistrial. As was explained by the First Circuit Court of Appeals in *United States v. Keene* (C.A.1, 2002), 287

F.3d 229, 233-234:

{¶ 25} "Our standard of review is intricate. Technically, we are called upon to review the [trial] court's denial of a motion to dismiss on double jeopardy grounds. * * * [T]he correctness of the [trial] court's decision ultimately hinges on the justification for ordering a mistrial. The decision as to whether to declare a mistrial speaks to the informed discretion of the [trial] court, and is customarily reviewed only for abuse of that discretion. See *United States v. Pierro*, 32 F.3d 611, 617 (1st Cir.1994). Where, as here, a motion to dismiss on double jeopardy grounds trails in the wake of the [trial] court's declaration of a mistrial, both the Supreme Court and this court have consistently applied an abuse of discretion standard in reviewing appeals from the denial of such motions. E.g., *Arizona v. Washington*, 434 U.S. at 514 --- *; *United States v. Jorn*, 400 U.S. 470, 486, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) * * *. We therefore review the [trial] court's decision here for abuse of discretion.

{¶ 26} " * * * As we use the term, [abuse of discretion,] it encompasses multiple layers of inquiry. See *Koon v. United States*, 518 U.S. 81, 98-100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). In the course of such review, "we accept the trial court's factual findings only to the extent that they are not clearly erroneous." *United States v. Bradshaw*, 281 F.3d 278, 291 (1st Cir.2002). In contrast, we evaluate the [trial] court's articulation of applicable legal rules de novo, cognizant that a mistake of law is equivalent to an abuse of discretion. *In re Grand Jury Subpoena*, 138 F.3d 442, 444 (1st Cir.1998); *United States v. Snyder*,

136 F.3d 65, 67 (1st Cir.1998). Only then do we inquire whether, in view of all the facts and circumstances, the trial court's finding of a manifest necessity to discharge the jury and declare a mistrial constitutes a misuse of its discretion. See *Illinois v. Somerville*, 410 U.S. 458, 462-63, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); *Brady v. Samaha*, 667 F.2d 224, 228 (1st Cir.1981)."

{¶ 27} Consequently, to the extent the visiting judge made factual findings based on the record at the time of the mistrial, this Court must defer to those findings. The relevant facts were not disputed, however, so the visiting judge was required to make very few findings of fact. The visiting judge's finding that there was no manifest necessity for a mistrial, on the other hand, was a legal conclusion that this Court reviews de novo. See *State v. Robinson* (1994), 182 Wis.2d 512, 514 N.W.2d 880. The visiting judge applied an incorrect legal standard in reaching his legal conclusion that there was no manifest necessity for a mistrial, and "a mistake of law is equivalent to an abuse of discretion." See *United States v. Keene, supra.* For the reasons that follow, this Court finds that the visiting judge committed reversible error in finding that there was no manifest necessity for a mistrial.

{¶ 28} Ross, and the visiting judge, improperly equated "manifest necessity" with absolute necessity. They faulted the original trial judge for failing to consider all possible alternatives to a mistrial, many of which were either not raised or were objected to by defense counsel at the time the trial judge was faced with the decision. This Court found no controlling or persuasive authority to

support the proposition that there is no manifest necessity for a mistrial unless the trial judge first rules out every possible alternative to a mistrial. Although the visiting judge cited authority for that proposition, that authority is not sound. The case cited by the visiting judge, *Love v. Morton* (C.A.3, 1997), 112 F.3d 131, 137, cites another federal appellate case, *United States v. McKoy* (C.A.3, 1979), 591 F.2d 218, 222, which in turn cites two United States Supreme Court cases, *United States v. Jorn, supra,* and *Arizona v. Washington, supra,* neither of which supports such a proposition. In both *United States v. Jorn* and *Arizona v. Washington,* the United States Supreme Court made it clear that a trial court abuses its discretion by declaring a mistrial without considering *any* alternatives; it did not hold that the trial court must rule out all possible alternatives before declaring a mistrial. See, also, *Crawford v. Fenton* (C.A.3, 1987), 646 F.2d 810, 818 (rejecting argument that double jeopardy will bar retrial unless trial court considered every available alternative before declaring a mistrial.)

{¶ 29} A "manifest necessity" for a mistrial does not mean that a mistrial was absolutely "necessary" or that there was no other alternative. See *Arizona v. Washington,* 434 U.S. at 511. To exercise "sound discretion" in determining that a mistrial is necessary, the trial judge should allow the defense and prosecution to state their positions on the issue, consider their competing interests, and explore some reasonable alternatives before declaring a mistrial. See *id.* at 514-516. The record in this case demonstrates that the trial judge allowed the parties

to state their positions, considered their competing interests, and made a thorough inquiry into reasonable alternatives prior to declaring a mistrial in this case.

{¶ 30} As the trial judge emphasized, and despite Ross's argument to the contrary, both Ross's interests and those of the State were implicated by the note from the jury foreperson. The note indicated, on its face, that the jury had been tainted with information that should not have been in the jury room and that one of the jurors was refusing to deliberate in good faith. Notes coming from the jury room are typically taken at face value. See, e.g., *State v. Sabbah* (1982), 13 Ohio App.3d 124, 468 N.E.2d 718. Moreover, at the time the trial judge discussed the note with both parties, neither party even suggested that the information in the note should be questioned. In fact, both parties objected to questioning any of the jurors about the note.

{¶ 31} The note was an indication of juror misconduct and the information within it was inherently reliable. No evidence that Brad Born (another potential suspect) had passed a polygraph test was presented at trial. For a juror to have gotten this information about the polygraph, he or she would have had to have gotten it from some outside source, suggesting that one of the jurors had disregarded the judge's instructions. According to the note, that juror had also shared the outside information with other jurors. The note further indicated that the juror who had the outside information was willing to agree with anything the others wanted because he was in a hurry to end the

deliberations.

{¶ 32} The face of the juror note, therefore, indicated that a member of the jury was refusing to deliberate in good faith and was sharing improper, prejudicial information with other jurors. Both Ross and the State were entitled to an impartial jury, free from bias for or against either party, and to a panel of jurors "who would abide by their oaths, individually, to 'well and truly try, and true deliverance make between the State * * * and the defendant * * *.' " *State v. Wilson* (1972), 29 Ohio St.2d 203, 211, 280 N.E.2d 915, quoting R.C. 2945.28.

{¶ 33} The State and the public have a significant interest in the integrity of the judicial process and that interest must impact the mistrial decision. See *United States v. Huang* (C.A.2, 1992), 960 F.2d 1128, 1136. A jury tainted with outside information and a juror who refuses to deliberate in good faith implicates not only the defendant's rights but also the public's interest in the integrity of the judicial process. See *Cleveland v. Wade* (Aug. 10, 2000), 8th Dist. No. 76652. In *Huang, supra,* the court noted that, even if a defendant chooses to waive an objection to a trial court error, he cannot "force the continuation of the trial to the prejudice of the government and the public. * * * [T]he court could reasonably conclude that a mistrial was required in the interests of justice." 960 F.2d at 1136.

{¶ 34} As the United States Supreme Court emphasized in *Arizona v. Washington,* "[n]either party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, 'the public's interest in fair trials

designed to end in just judgments' must prevail over the defendant's 'valued right' to have his trial concluded before the first jury impaneled." *Arizona v. Washington* (1978), 434 U.S. 497, 516, 98 S.Ct. 824, 54 L.Ed.2d 717, quoting *Wade v. Hunter* (1949), 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974.

{¶ 35} Ross and the visiting judge repeatedly emphasized the fact that the prosecution did not argue that the State's interests were at stake but spoke only of the potential prejudice to Ross, suggesting that such a failure somehow waived the State's interest or removed it from the mistrial balancing test. Although the parties may not have emphasized the potential for prejudice to the State at the time the original trial judge contemplated the possibility of a mistrial, the trial judge clearly did.

{¶ 36} As the original trial judge stressed on the record before she declared a mistrial:

{¶ 37} "[H]e's made these representations to other jurors in that jury room and that he is refusing in good faith to negotiate with other jurors; that he is refusing in good faith to continue deliberations fully and fairly; that he is indicating that he would leave at the end of today and that they must conclude this case today. This is a refusal to fulfill the obligation of a juror.

{¶ 38} "[The] Court also is concerned that his representations regarding evidence that he apparently believes based on this, evidence that was not presented during trial."

{¶ 39} At the same time, the trial judge explained how, during voir dire, each juror was asked whether there was any reason that they could

not render a full and impartial decision and that this juror had an obligation to indicate at that time, which he did not do, if he had a pressing matter at home or if he had information about the case that would influence his decision. The judge then found "that as a result of his representations to other jurors that he has impeded full and fair deliberation of the evidence in this case and that the Court is absolutely convinced that there's no way what the bell has struck I can unring."

{¶ 40} Although the visiting judge concluded that the original trial judge had rushed to judgment without thoroughly considering the alternatives available, that conclusion was not supported by the record of what transpired on October 28, 2000.[3] Prior to declaring a mistrial, the original trial judge asked the parties to state their positions on this issue and discussed with them each of the proposed alternatives to declaring a mistrial.

{¶ 41} The obvious reason for allowing the parties to be heard on the issue is to provide them with an opportunity to not only comment on, but to participate in, the decision to declare a mistrial. See *United States v. Lynch* (C.A.D.C.1978), 598 F.2d 132, 136. In determining whether a trial judge abused her

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The primary emphasis of Ross's arguments and the visiting judge's opinion was on information that was discovered after the mistrial was declared. This Court does not comment upon any of that information. As this Court has already emphasized, it confines its review to the record prepared at the time the decision was made.

discretion in declaring a mistrial sua sponte, reviewing courts focus on whether she allowed the parties to suggest alternatives and whether she considered those proposed alternatives. See, e.g., *Long v. Humphrey* (C.A.8, 1999), 184 F.3d 758, 761; *United States v. Bates* (C.A.9, 1991), 917 F.2d 388, 396; *United States v. Klein* (C.A.2, 1978), 582 F.2d 186, 195.

{¶ 42} "A judge cannot be required to consider every conceivable alternative before declaring a mistrial; so to require would be to ask the impossible. The judge must consider reasonable available alternatives. If an alternative which was neither suggested by counsel nor considered by the judge is later developed, we will not fault the judge, so long as an honest inquiry into alternatives is made." *Commonwealth v. Cassidy* (1991), 410 Mass. 174, 179, 571 N.E.2d 383. See, also *United States v. DiPietro* (D.Mass., 1990), 741 F.Supp. 293, 297 (finding defendant's contention that court did not exercise sound discretion was unfounded, particularly because defense counsel proposed no alternatives at the time).

{¶ 43} Ross proposed that the trial judge allow the jury to continue deliberating and grant him a mistrial if the jury found him guilty. Ross has repeatedly insisted that he had the right to have his fate decided by this jury and that he had the right to waive any prejudice to him caused by the improper polygraph information. He never indicated that he was willing to waive that prejudice, however. Despite Ross's argument to the contrary, he did not attempt to preserve his right to have his fate

decided by the original jury. A defendant's right to go forward with his original jury encompasses the notion that the defendant may want to have his fate determined once and for all and avoid having to stand trial a second time. As demonstrated by the very cases that Ross cited in support of his argument, however, allowing the jury to determine a defendant's fate means that the defendant agrees to take his chances and is willing to accept the jury's verdict, be it guilty or not guilty. See, e.g., *United States v. Dinitz* (1976), 424 U.S. 600, 608, 96 S.Ct. 1075, 47 L.Ed.2d 267; *United States v. Andrews* (C.A.7, 1990), 895 F.2d 406, 409. "As a matter of constitutional right, an accused person in this country who perceives himself mid-trial to have a 'winner' is entitled to his 'shot at the jury'[,]" but taking a "shot" necessarily includes the risk of a guilty verdict. *State v. Parkinson* (Aug. 9, 1990), 5th Dist. Nos. CA-3506 and CA-3508. Ross never expressed a willingness to take his chances with the first jury, for he was only willing to accept a verdict of not guilty. He wanted to preserve a mistrial for himself if a guilty verdict was rendered.

{¶ 44} As the trial judge stressed, the alternative proposed by Ross protected only his rights and did not protect the public's interest in having an accused's guilt or innocence determined through a fair and impartial process. Because the interests of both Ross and the State were implicated by the foreperson's note, the trial judge reasonably rejected Ross's proposed alternative, indicating that it was not fair to the State.

{¶ 45} The trial judge asked the parties if they

wanted to voir dire the jury foreperson or the complaining juror. Both parties refused and objected to voir dire of any of the jurors. Ross's counsel stated on the record that Ross was opposed to any voir dire of the jury because "that would have a prejudicial impact on their deliberations." After the fact, however, Ross contended that the trial judge abused her discretion for failing to voir dire the jury. It is important to note that both Ross and the visiting judge repeatedly condemn the original trial judge's failure to discover, prior to declaring a mistrial, that the jury had completed three verdict forms. This Court must again emphasize that, at the time the trial judge made the mistrial decision, the existence of these verdicts was unknown and both parties were voicing their objections to any questioning of the jurors. Without a voir dire, how could the judge have discovered the verdict forms? Moreover, any direct inquiry into the status of deliberations, or whether there were partial verdicts, would also have been improper. To fault the original trial judge, in hindsight, for failing to voir dire the jurors over the objections of both parties is a tactic that this Court cannot countenance.

{¶ 46} As legal support for his position that voir dire was required, despite the objections of the parties, Ross cites *State v. Gonzalez* (Dec. 3, 1999), 6th Dist. No. H-99-002, in which the appellate court found that the trial court abused its discretion by declaring a mistrial based on a note from the jury room because the trial court did not voir dire the jurors first. *Gonzalez* is distinguishable for several reasons, most notably that the defendant had

specifically requested the trial court to voir dire the jury but the court refused to do so, and the note was unsigned and involved only a potential problem with one juror not being able to hear clearly. The circumstances here were completely different where the foreperson of the jury submitted the note and it contained specific details about a juror's failure to deliberate in good faith and the introduction of evidence to the jury that was not presented at trial. *Gonzalez* itself made clear that voir dire of the jury, before declaring a mistrial, is not necessary in every case where a jury submits a note to the court when the note itself is sufficiently detailed.

{¶ 47} The trial judge clearly considered a voir dire of one or more of the jurors prior to declaring a mistrial but, because both parties voiced their objections, she did not pursue that option. As stressed above, in evaluating the trial court's exercise of discretion, a reviewing court must look at all of the surrounding circumstances, including what was expressed by the parties at the time the trial court considered its options. That the trial judge honored the wishes expressed by the parties and did not voir dire any of the jurors seems to comport with an exercise of sound discretion, not an abuse of it. See, also, *State v. Wilson*, 1st Dist. No. C-000670, 2002 Ohio 1854, ¶ 75 (finding that trial court did not err in failing to grant a mistrial sua sponte when defendant asked the court to forgo that option and proceed with the trial. "Wilson cannot now complain that the trial court should have ignored his request[.]"). The original trial judge in this case did not abuse her

discretion for deciding not to pursue an alternative that both parties opposed.

{¶ 48} Finally, the visiting judge emphasized the fact that the original judge did not pursue the option of removing the complaining juror, either by seating an alternate or by removing the juror and proceeding with eleven jurors. In his opinion, the visiting judge repeatedly emphasized this as a viable alternative to a mistrial, a conclusion that was not supported by the record in this case.

{¶ 49} The original trial judge did consider the alternative suggested in the jury foreperson's note, replacing the complaining juror with an alternate juror, but she rejected that course of action because she did not "believe seating an alternate at this point in time could undo the damage that's been done to the deliberations in this case." Moreover, the possibility of seating an alternate at that point in the proceedings would not have been lawful. Crim.R. 24(F) provides for replacing jurors, who are unable to serve or are disqualified, with alternate jurors "prior to the time the jury retires to consider its verdict[.]" R.C. 2313.37(D) likewise allows an alternate juror to replace a juror for certain enumerated reasons only "before the final submission of the case to the jury[.]"

{¶ 50} In capital murder cases, however, Crim.R. 24, as it existed at the time of Ross's trial, was less than clear on the role of alternate jurors after the case was submitted to the jury for deliberation. Former Crim.R. 24(F) explicitly provided that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider

its verdict." The rule also provided, however, that "[a]fter submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court." Crim.R. 24(G)(1)(c). The Ohio Supreme Court interpreted the language of former Crim.R. 24(F) and (G)(1)(c) to allow for substitution of a regular juror with an alternate "after the guilt phase verdict, but before deliberations begin in the penalty phase." *State v. Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432, paragraph three of the syllabus. There was no language in former Crim.R. 24 to allow for substitution during deliberations, however. As the *Hutton* court noted, "after the jury retires to deliberate, alternates may not replace regular jurors." *Id.* at 46, 559 N.E.2d 432. Crim.R. 24(F) has been amended to explicitly incorporate this understanding.[4] Because the option of replacing the complaining juror with an alternate was not even available to the trial court, the trial court did not abuse its discretion for failing to do so.

{¶ 51} The visiting judge further faulted the original trial judge for failing to dismiss the complaining juror and allowing deliberations to proceed with eleven jurors. The alternative of

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[4] Crim.R. 24(F) was amended, effective July 1, 2002, to provide that in capital cases, alternate jurors continue to serve in the event that a substitution is required after the jury deliberation in the guilt phase and before deliberation in the penalty phase, but that "[n]o alternate shall be substituted during any deliberation." Crim.R. 24(F)(2).

proceeding with eleven jurors was not proposed by Ross, nor had he consented to it. Consequently, the trial court could not have forced a jury of eleven on Ross. See *State v. Wilson*, 1st Dist. No. C-000670, 2002 Ohio 1854, citing *State v. Baer* (1921), 103 Ohio St. 585, 134 N.E. 786, parargraph two of the syllabus. Furthermore, even if Ross has consented, the State could not be compelled to proceed with only eleven jurors. See Crim.R. 23(B).

{¶ 52} As the original trial judge explained on the record, she felt that she had no other alternative but to declare a mistrial. This Court finds no abuse of discretion in that determination. The visiting judge, based on an incorrect legal standard, erred in finding that there was no manifest necessity for a mistrial. The fact that another trial judge may have handled the situation differently, or that, in hindsight, defense counsel would have the trial judge consider additional alternatives, does not demonstrate that the original trial judge abused her discretion in determining that a mistrial was necessary. See *Arizona v. Washington*, 434 U .S. at 509-510. The second assignment of error is sustained and the case is reversed and remanded for retrial.

Judgment reversed and the cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas,

County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

Exceptions.

/S/ Donna J. Carr
DONNA J. CARR
FOR THE COURT

WHITMORE, J.,
CONCURS.

BAIRD, P.J.,
DISSENTS, SAYING:

{¶ 53} Upon motion to bar retrial, filed by the defendant, the Common Pleas Court of Summit County held an evidentiary hearing. At that hearing, the burden was on the prosecution to show that the court's previous order of a mistrial had been manifestly necessary.

{¶ 54} "Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." *Arizona v. Washington* (1978), 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717.[5]

{¶ 55} After hearing the evidence presented at such hearing, the Common Pleas Court of Summit

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[5] Though not even mentioned in the majority opinion, the defendant not only objected to the declaration of a mistrial, but also personally stated on the record that he wished to proceed with the jury that had been empanelled. Where the potential reason for declaring a mistrial is, as here, a factor that is detrimental to the defendant's case, and favorable to the prosecution's case, the conclusion seems obvious: to proceed or not to proceed is the defendant's call.

County made the factual finding that manifest necessity did not exist.

{¶ 56} This conclusion, that the state had not met its burden and that there was no manifest necessity for a mistrial, represents the final decision of the Summit County Court of Common Pleas as to this matter. That is what is before us today and that is what is entitled to deference by this Court.

{¶ 57} Accordingly, I agree with very little, if any, of the thrust of today's majority opinion in this case. However, notwithstanding that point, even if this case were properly to be decided on the battleground prescribed by the majority, my conclusion would not differ.

{¶ 58} In other words, even if this appeal were to have been from the mistrial order itself, I would conclude that there was no discretion for the trial court to exercise, in the absence in the record of any exploration of other alternatives. The only thing the court had was the note itself, the wording of which is a slim reed upon which to base the denial to the defendant of a right guaranteed to him by both the Ohio and United States Constitutions. A court has no right to take away such a right unless the record amply supports the necessity for such action, and it is up to the trial court to create such a record, whether anybody asks for it or not

{¶ 59} Accordingly, I would affirm the decision.

SUPREME COURT OF OHIO

STATE

v.

ROSS

No. 2003-0299

May 7, 2003

APPEALS NOT ACCEPTED FOR REVIEW

Summit App. No. 20980, 2002-Ohio-7317. Discretionary appeal and motion for admission pro hac vice of David Z. Chesnoff by attorneys Lawrence J. Whitney and Mak Kravitz denied.

Lundberg Stratton, J., dissents.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DENNY ROSS,	)	5:04cv00849
	)	
Petitioner,	)	JUDGE DAVID D. DOWD, JR.
	)	(Magistrate Judge Kenneth
v.	)	S. McHargh)
	)	
JAMES PETRO, et al.,	)	
	)	REPORT AND RECOMMENDED
Respondents	)	DECISION OF MAGISTRATE JUDGE

McHARGH, MAG. J.

The petitioner Denny Ross ("Ross") has filed a petition for a writ of habeas corpus on double jeopardy grounds regarding his pending retrial on criminal charges of aggravated murder, rape, and other crimes, following a mistrial in the Summit County, Ohio, Court of Common Pleas.

The undersigned Magistrate Judge submits the following Report and Recommended Decision.

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Denny Ross (Ross) has filed a petition for a writ of habeas corpus regarding his pending retrial on

charges of aggravated murder, tampering with evidence, and gross abuse of a corpse, following a mistrial in the Summit County (Ohio) Court of Common Pleas. The petition is based on the Fifth Amendment constitutional protection against double jeopardy. (Doc. 1, at ¶¶ 2-3; doc. 57, at ¶¶ 2-3.) *See* generally *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978);*Harpster v. Ohio*, 128 F.3d 322, 327 (6th Cir.1997), *cert. denied*, 522 U.S. 1112, 118 S.Ct. 1044, 140 L.Ed.2d 109 (1998). The double jeopardy claim arises from the trial court's allegedly improper declaration of a mistrial, over the objection of the defendant, in a situation where the petitioner claims that the jury had already rendered unanimous "not guilty" verdicts on the charges of aggravated murder, murder, and rape. (Doc. 1, at ¶¶ 6, 42, 58; doc. 7, Petitioner's exhibit (hereinafter, "PX") G.)

I. STATE PROCEDURAL BACKGROUND

Ross was arrested on May 27, 1999, in connection with the murder of Hannah Hill. (Doc. 7, PX 12, Summit County docket; doc. 35, Respondent's exhibit (hereinafter, "RX") 1, docket.) On June 10, Ross was indicted on charges of aggravated murder, rape, kidnapping, tampering with evidence, and abuse of a corpse. (Doc. 35, RX 3, indictment. *See also* RX 51, supplemental indictment of Dec. 20, 1999.) Ross was arraigned on June 11, 1999. (Doc. 35, RX 14.) The jury trial commenced on September 28, 2000, in the Summit County Court of Common Pleas, Judge Jane Bond ("Judge Bond") presiding.

On Oct. 19, 2000, the court ordered that all jurors were to be identified solely by assigned number, because of the extraordinary level of pretrial publicity and concerns for the privacy of the jurors. (Doc. 35, RX 158.) That day, the Akron Beacon Journal had requested the production of the jury questionnaires, along with the names and addresses of the jurors. *See State ex rel. Beacon Journal Pub. Co. v. Bond*, 98 Ohio St.3d 146, 147, 781 N.E.2d 180, 184 (2002).

At the close of the prosecution's case, the court granted a Rule 29(A) motion for acquittal on the charge of kidnapping. (Doc. 35, RX 168, journal entry.)

During the prosecution's rebuttal in closing argument, the defendant objected to several purported misstatements of evidentiary facts. *See, e.g.*, doc. 35, RX 291, trial transcript (hereinafter, "Tr."), at 1172, 1175, 1248-1252. The court overruled these objections, and the defendant moved for a mistrial with prejudice on the basis of the prosecution's allegedly improper closing rebuttal. (Doc. 35, RX 169 and 167; RX 292, Tr., at 1267.)

The case went to the jury on Oct. 27, 2000. On Saturday, October 28, while the jury was deliberating, the trial judge received a note from the foreperson which raised an issue of juror misconduct. The trial judge offered the parties the opportunity to voir dire the foreperson or the suspect juror, which they declined. The judge then asked the parties whether they would consent to the discharge of the jury. The state consented, but Ross did not. (Doc. 35, RX 168, journal entry.) The court declared a mistrial.

(Doc. 35, RX 292, Tr., at 1276-1277.) On Nov. 2, 2000, the judge set a new trial date, and journalized the declaration of the mistrial. (Doc. 35, RX 171; *State v. Ross*, No. 20980, 2002 WL 31890088, at *2 (Ohio Ct.App. Dec. 31, 2002).) The events surrounding the mistrial will be discussed in more detail in the following section.

After the trial court's declaration of a mistrial, Ross filed several motions on Nov. 9, 2000. Ross filed a motion for a judgment of acquittal, pursuant to Ohio R.Crim. P. 29(C), on the counts of aggravated murder, murder, rape, tampering with evidence, and abuse of a corpse. (Doc. 35, RX 176.) Ross also filed a motion to perfect the verdicts, based on the completed jury forms which apparently indicated the jury had reached "not guilty" verdicts on the charges of aggravated murder, murder, and rape. (Doc. 35, RX 177; doc. 7, PX G.) In addition, Ross filed a motion to bar retrial on the grounds of double jeopardy. (Doc. 35, RX 174.)

Finally, Ross filed a motion to disqualify the trial judge (Judge Bond), on the grounds that she had "exhibited bias toward Ross and is likely to be a witness in the proceedings in this case." (Doc. 35, RX 178, at 3.) On Jan. 17, 2001, the Ohio Supreme Court granted the motion to disqualify on the basis that "there appears to be a significant likelihood that Judge Bond will be called to testify in subsequent proceedings about her actions in this case after she learned of possible juror misconduct." (Doc. 35, RX 189; *In re Disqualification of Bond*, 94 Ohio St.3d 1221, 763 N.E.2d 593 (2001) (Moyer, C.J.)) The case was transferred to Judge Joseph Cirigliano, Visiting

Judge Sitting on Assignment.

An evidentiary hearing on the post-trial motions was held before Judge Cirigliano on May 22, 2001. Based on the evidence presented, the judge found that there had been no manifest necessity for a mistrial, that the first trial judge had abused her discretion by declaring a mistrial, and held that a retrial of Ross was barred by his constitutional protection against double jeopardy. The court declined to rule on the other pending motions at that point. (Doc. 35, RX 229, order of Feb. 15, 2002; doc. 7, PX A.)

The state appealed on two grounds, including that: "The second trial court's dismissal on double jeopardy grounds is a nullity because the first trial court acted within [its] discretion by declaring a mistrial sua sponte."(Doc. 35, RX 300, at 14.) The court of appeals agreed with this assignment of error, and reversed: "The visiting judge, based on an incorrect legal standard, erred in finding that there was no manifest necessity for a mistrial."The case was remanded for retrial. (Doc. 35, RX 312, at ¶ 52; *Ross*, 2002 WL 31890088, at *10.) Ross appealed to the Ohio Supreme Court, which declined to hear his appeal on May 7, 2003. (Doc. 35, RX 315; *State v. Ross*, 98 Ohio St.3d 1567, 787 N.E.2d 1231 (2003).)

On Sept. 10, 2003, the trial court denied the motion to perfect the verdicts, on the basis that the jury had been discharged prior to the verdicts being given to the court. The court also denied the Rule 29 motion for acquittal. The court set a trial date of Nov.

17, 2003.[1] (Doc. 35, RX 251.)

On reconsideration of the Rule 29 motion, however, the court acquitted Ross on the charge of rape on Dec. 22, 2003, although denying acquittal on the other charges. (Doc. 35, RX 273.) The state has appealed that ruling, but that (second) appeal is not the subject of this habeas petition. *See* Doc. 35, RX 276, 278; *State v. Ross*, No. 21906 (Ohio Ct.App. filed Jan. 20, 2004).

A. Trial Court's Declaration of Mistrial

On Saturday, October 28, 2000, during jury deliberations, the trial judge received a note from the foreperson which raised an issue of juror misconduct. The note read as follows:

> There is a concern about a Juror. I was approached by a spokesperson for 4 other Jurors. From comments made by this Juror these 4 Jurors feel that he is agreeing with the group to expidite (*sic*) this process. I was told by these Jurors that they (*sic*) following comments were made
> 1.) We need to get this done today.
> 2.) Why are we even discussing this.
> He has stated all along that he believes one thing but has all to (*sic*) quickly changed his vote to go along with the group. This morning this Juror stated to me that we need to finish

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[1]The trial date was later continued. (Doc. 35, RX 258.)

this today as he will be leaving after today because he has a problem at home but he did not want to put us in that position.
To another Juror he made the comment that he knows that Brad O'Born was innocent because he passed a polygraph test so Denny Ross had to be guilty.
I have been asked if this Juror can be released so that he may tend to his affairs at home, and we can have an impartial and fair jury.
Juror # 4

(Doc. 35, RX 168; RX 292, Tr., at 1264-1265.) The court notified counsel and gave them an opportunity to consult before proceeding on the record at 3:40 p.m.

The court asked counsel whether they would "consent to the discharge of the jury without prejudice to the further prosecution of the case," pursuant to Ohio Rev.Code § 2945.36(D). (RX 292, Tr., at 1266.) The prosecution consented, referring to the defendant's right to a fair trial. *Id.* The defense renewed their motion for a mistrial with prejudice, based on the improper closing, but the court deferred ruling on that motion until the prosecution had "a full or fair opportunity to respond." *Id.* at 1267.

The defense then made several requests:

MR. PANCER [defense counsel]: The second request is that the jury be instructed to continue to deliberate, a verdict be rendered

with the defense option of a mistrial if the decision were to be unfavorable. The theory for that request is that the extra judicial evidence that exists in the jury room is not evidence that is favorable to the defense and hence we believe a verdict of not guilty would not be tainted as a-as any other verdict would be, Your Honor. That is our next request.

THE COURT: All right, sir. The motion is denied. I think that's fundamentally unfair to the State.

MR. PANCER: Our next request is a mistrial with prejudice.

THE COURT: And the basis for that?

MR. PANCER: The basis for that is the motions that we have previously filed in this case, the motion we have filed with this Court and all the grounds that might have given rise to a mistrial motion, Your Honor, including the question-including the information contained in the taped statement of Denny Ross.

THE COURT: And so you're essentially renewing your previous motions for this Court?

MR. PANCER: Yes, in the context of this hearing.

THE COURT: All right, sir. Motion is overruled.

MR. PANCER: Okay. I talked to Mr. Ross. He does not wish to have a mistrial in this case. I've told him the different sections of the code that allow it in terms of the one under his consent. He does not want it to be on that particular ground, Your Honor.

(RX 292, Tr., at 1268-1270.)

The court established that Ross had discussed the matter with his counsel, and informed Ross that the law provides that he is able to consent to a mistrial based on what the court characterized as "the misconduct and corruption of at least one of the jurors in this trial." *Id.* at 1270. Ross indicated that he did not want a mistrial. The court continued:

> THE COURT: ... my concern based on this is that this evidence and these statements that have come from this jury are extremely damaging to the prospect that you could receive a fair trial, sir.
> What this note is saying, Mr. Ross, is that at least one juror believes you're guilty based upon no evidence that was presented during this trial. Do you understand that?
> THE DEFENDANT: I understand, Your Honor.
> THE COURT: And that he's made these representations to other jurors in that jury room and that he is refusing in good faith to negotiate with other jurors; that he is refusing in good faith to continue deliberations fully and fairly; that he is indicating he would leave at the end of today and that they must conclude this case today. This is a refusal to fulfill the obligation of a juror.
> Court also is concerned that his representations regarding evidence that he apparently believes based on this, evidence that was not presented during trial.

(RX 292, Tr., at 1270-1271.) The court noted that during jury instructions the jurors were advised of their obligation to render a fair and impartial decision, and to advise the court if there were any reasons that they could not do so. *Id.* at 1271-1272. The proceeding continued:

> THE COURT: ... Court further finds that as a result of his representations to other jurors that he has impeded full and fair deliberation of the evidence in this case and that this Court is absolutely convinced that there's no way what the bell has struck I can unring.
> And his representations to other jurors regarding the guilt of Mr. Ross based upon this purported polygraph test I don't believe could be purged. And I don't believe seating an alternate at this point in time could undo the damage that's been done to the deliberations in this case.
> And, no, Mr. Ross, none of us wants a mistrial. Based upon the communication from the juror, I have offered to both the prosecution and the defense the opportunity to voir dire either Juror No. 4 or to identify and voir dire the juror who purportedly has made these statements. Do you wish that opportunity on behalf of the prosecution?
> MR. GREVEN: No, Your Honor. We are not in favor of voir dire during deliberations.
> THE COURT: On behalf of the defense?
> MR. PANCER: We have the same position.
> THE COURT: So you are not requesting that the

Court voir dire any of the jurors regarding their potential for service in this case?
MR. PANCER: Not at this time.
THE COURT: This is the time, sir. There is no other.
MR. PANCER: No, no. We're not asking the Court to voir dire the jury.
THE COURT: All right.
All right. Court, based upon its stated conclusions and based upon the face of the communication given by Juror No. 4, and since neither party wishes additional inquiry to be made by the Court in regard to a voir dire of any of the potential jurors, Court finds that the jury is unable to fulfill the obligations required by law, to fully and fairly consider the evidence and render a verdict based upon the evidence and the law in this case.

(RX 292, Tr., at 1272-1274.) The court found that there had been no misconduct by counsel from either side in regard to this matter. The court found that "there has been no evidence of any misconduct or jury tampering outside the province of the 12 jurors themselves," and asked if anyone had any information to the contrary. Id. at 1274-1275. At this point, the defense interjected:

MR. CHESNOFF: Your Honor, excuse me. We're not foreclosed from exploring this? I mean, I know you said we don't have any information now, but that is not in any way-
THE COURT: Do you want to voir dire the jury,

sir?
MR. CHESNOFF: Not during their deliberations I do not. I think that would have a prejudicial impact on the deliberations.
THE COURT: I will permit inquiry of the jury after a decision has been made by the Court if the jury is discharged. Certainly that will be done. However, I want to make the record clear that I am giving the prosecution and the defense an opportunity to have this Court and to have them voir dire any individual jurors during deliberations in response to this.
MR. CHESNOFF: Thank you, Your Honor. We appreciate that. We understand the distinction.
THE COURT: And you decline that?
MR. CHESNOFF: Yes.
THE COURT: And the prosecution has declined that?
MR. GREVEN: Yes.

(RX 292, Tr., at 1275-1276.) The court again inquired as to whether anyone had any further information regarding jury tampering, and noted that the court had no factual basis for believing that a polygraph of O'Born had been conducted. The court continued:

THE COURT: ... All right. No one having come forth, the Court has-based upon the representations made, the Court finds pursuant to Ohio Revised Code 2945.36 that there is corruption of a juror pursuant to

subsection A. Court finds that this jury cannot render a fair and impartial verdict in accordance with the law. The Court therefore discharges the jury without prejudice to the prosecution. A mistrial is declared.
Court will summons this panel and they will be discharged from further attendance.
I will hear further in regard to this matter on Monday morning at 9:00, require the attendance of all at that time.
I will further allow inquiry to be made of this jury once they have been discharged. That will not be record inquiry, however.
MR. PANCER: It will be here today, Your Honor?
THE COURT: Yes, sir. It will be here today.
MR. PANCER: We can visit with them?
THE COURT: Yes, sir.
MR. CHESNOFF: May we have one moment, Your Honor?
MR. GREVEN: Your Honor, I just have a question as to whether the Court will be conducting this inquiry or if this is just going to be-I kind of get the impression from the last thing the Court said it's going to be a free-for-all, if we catch them in the hall kind of thing. Will the Court be doing this? Would the Court like us to do it? How would you like to proceed?
THE COURT: I will discuss that with you in chambers before they are discharged.
MR. GREVEN: All right.
MR. CHESNOFF: Thank you.

(RX 292, Tr., at 1276-1278.) There followed a brief discussion regarding the filing of the earlier motion, and the court was adjourned at 4:00 p.m. *Id.* at 1279. The events that followed the adjournment were not on the trial record, but are relevant to this court's consideration of the mistrial.

B. Post-Trial Evidentiary Hearing

On May 22, 2001, Judge Cirigliano held an evidentiary hearing on the post-trial motions. (Doc. 35, RX 293 and 294, Hearing Transcript (hereinafter, "H.Tr.").) Testimony was taken from Melissa Gribek ("Gribek"), a trial juror; Thomas L. Orwig, Jr. ("Orwig"), the jury foreman; Judge Jane Bond; Jill Coleman ("Coleman"), Judge Bond's bailiff; and David Chesnoff ("Chesnoff"), defense counsel. In addition, counsel proffered the testimony of defense counsel David Nickerson ("Nickerson") and Michael Pancer ("Pancer"). (RX 294, at 183-186.)

1. Parties' arguments

Counsel for Ross argued that *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), held that a mistrial declared over the objection of the defendant bars a retrial, unless there was a "manifest necessity" supporting a mistrial. Further, Ross argued that the prosecution had a heavy burden to justify the trial judge's action, and that the court must examine with "a high degree of scrutiny" the judge's decision to declare a mistrial. (RX 293, H.Tr., at 7.) He further asserted that

the Supreme Court, in Jorn v. Dalitz,[2] mandated that "a defendant has a constitutional right to go to the first jury to end the dispute with an acquittal." *Id.* at 8-9.

Counsel for Ross said that they consulted with other counsel after the jury note came in, and they all believed that they had won the case before the jury. *Id.* at 9. Based on what they believed was the weakness of the prosecution's evidence, they had made a tactical decision to close, without putting on any defense evidence, after the close of the prosecution's case. *Id.* at 10.

After consultation, counsel for Ross decided not to voir dire the jury during deliberations because they "were concerned that it would prejudice the jury, and since the polygraph evidence that was the subject of the note only could potentially prejudice [Ross]," they believed the decision as to whether to accept a mistrial was their choice. *Id.* at 11. Ross asserted that the prosecution conceded that there was no prejudice to the state by way of the juror's note. *Id.*

Ross argued that several alternatives to mistrial were available to the trial judge: The law in Ohio permits partial verdicts; the juror could be replaced

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[2] Presumably, counsel intended to refer to *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) and *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). The court is unable to locate a Supreme Court case entitled *Jorn v. Dalitz*.

with an alternate; the jury could have deliberated with eleven members, rather than twelve. In addition, Ross contended that Supreme Court precedent places an obligation on the judge to voir dire the jury in such a case. *Id.* at 11-12.

Ross pointed out that after the trial judge orally declared a mistrial, the judge learned that verdicts had been reached on several counts. Ross contended: "At that moment in time manifest necessity no longer existed." *Id.* at 22.

Counsel for the state responded that, although neither side wanted to voir dire the jury, both sides wanted a mistrial. The state contended that a mistrial was appropriate because "all the evidence indicated that there was an unfair trial, that there was a juror that was poisoning and contaminating the minds of other jurors with evidence that was not properly admitted." *Id.* at 33. The state also argued that there was no defense objection to the mistrial, nor to the discharge of the jury, on the record. *Id.* at 34-35.

The state contended that "double jeopardy did not attach in this case." Although the state did not argue in terms of "manifest necessity," their summary argument stated: "The facts that [Judge Bond] saw at that time with the assistance and advice from the parties indicated that a mistrial and the discharge of the jury was the only reasonable alternative." *Id.* at 40. The state conceded that there may have been "more than one reasonable solution," but "[t]he fact she chose this one doesn't make her decision subject to attack by the defense

at this late date." *Id.*

Ross responded that the defense did not want a mistrial, but made it clear to the judge that they wanted the deliberations to continue. *Id.* at 41. They argued that *Corey v. District Ct. of Vermont,* 917 F.2d 88 (2d Cir.1990), is "a classic rendition of when manifest necessity does not exist for a mistrial on facts consistent with the facts of this case." Id. at 42.

2. Testimonial evidence at hearing

Juror Gribek testified that the three contested verdict forms were signed on Saturday, Oct. 28, 2000, prior to the jury's lunch break. (Doc. 35, RX 293, H.Tr., at 57.) Juror Orwig, the foreman, also testified that the verdict forms were signed on Saturday morning, prior to the lunch break. *Id.* at 72. Orwig composed the note to the judge after the verdict forms were signed, and he testified that the events that led him to write the note occurred after the verdict forms were signed. Id. at 72, 74.

Judge Bond testified that she received the note from the jury after the lunch break, sometime in mid-afternoon. (RX 294, H.Tr., at 88, 115.) Judge Bond characterized the note as "extremely" prejudicial to Ross, because one juror was "expressing an opinion on the guilt of the defendant" based on the purported polygraph information. *Id.* at 89. As a result of receiving the note, counsel were called into the judge's chambers. *Id.* at 89-90. In chambers, a number of alternatives were discussed, but the final result of the discussion was that the judge decided to declare a mistrial. *Id.* at 90. Among the

alternatives discussed were: seating an alternate juror; voir dire of the jury; allowing the jury to finish deliberating; and declaring a mistrial. *Id.* at 90-91.

The trial judge conceded in her testimony that she had offered Ross a mistrial, which he refused, at several other points during the trial process. At one point, during voir dire, the parties learned that some of the potential jurors had been tainted by a broadcast that they saw in the jury room. The judge offered Ross the chance to re-impanel and start the voir dire selection process anew. Later, the defense objected to certain evidence because they had not had the opportunity to test it. The judge offered Ross the opportunity to start the trial over, and test the evidence, and he rejected that. *Id.* at 99-101.

With regard to the juror's note, after a period of time, the parties returned to the courtroom, on the record. *Id.* at 90. The proceedings on the record have been summarized above. Judge Bond testified that, when she declared the mistrial, the jury was not in the courtroom, but in the jury room. *Id.* at 103. After the judge declared the mistrial, she went back to her chambers, and then walked into the jury room. *Id.* at 102-103.

The amount of time that the judge remained in her chambers before going to the jury room is in dispute. Judge Bond testified:

> Q. You went back to the jury room; is that correct?
>
> A. First I went back to my chambers and then after a period of time I walked back into the

jury room.

Q. You went back to your chambers and picked up the juror information release forms; is that correct?

A. I waited for what I thought was going to happen next. When it didn't happen, I picked up the release forms and went out and stood in the entry door to the courtroom and everybody was there and so I walked back to the jury room.

(RX 294, H.Tr., at 103-104.) Defense counsel Chesnoff testified that Judge Bond remained in her chambers for thirty seconds before she left her chambers and went directly to the jury room. *Id.* at 175. The proffered testimony of defense counsel Nickerson would also be that the judge remained in her chambers for "no more than 30 seconds," *id.* at 184, and defense counsel Pancer would also have testified that she remained in chambers for "no more than a minute, I think about half a minute," *id.* at 185.

Gribek and Orwig testified that Judge Bond then came into the jury room alone, without a court reporter or counsel for either side. (RX 293, at 58, 74; *see also* RX 294, at 104.) At that point, she informed the jury of her decision to declare a mistrial. *Id.* at 58, 74-75; *see also* RX 294, at 104. Gribek testified that there was "a lot of emotion" in the jury room, and "there were generally comments from everyone in the room not understanding why she was doing this." *Id.* at 58-60. Judge Bond testified that some of the jurors were "extremely upset." (RX 294, at 104.)

Gribek and Orwig testified that Judge Bond advised the jurors that if any one of them wanted to speak with her individually, she would accommodate that. (RX 293, at 61, 75.) Gribek and Orwig were among the five jurors who spoke with the judge in her chambers. *Id.* at 62, 75. Within a few minutes of the judge leaving the jury room, the five jurors were escorted to the judge's conference room. *Id.* at 63.

Gribek was the second juror brought into the judge's chambers, individually, to speak with her. *Id.* at 63. Gribek informed the judge that verdicts had been reached on several counts, and the forms had been signed. *Id.* at 64; *see also* RX 294, at 106. Orwig was aware that Gribek had told Judge Bond that there were signed verdicts. *Id.* at 76. The judge did not inquire as to whether the verdicts had been reached before the issues in the juror's note arose. (RX 294, at 115-116.) Her bailiff was instructed to return to the jury room to collect the verdict forms. *Id.* at 166-167.

Gribek expressed some concern to Judge Bond about what would happen to Ross now, and the judge told her that there was certain evidence that wasn't introduced during the trial, and so there would be another trial. (RX 293, at 65.)

After Gribek spoke with the judge and notified her of the verdicts, the five jurors were still together in the judge's chambers area, and the remaining seven jurors were waiting in the jury room. *Id.* at 66-67. The jurors had made a decision to wait for each other, to leave together. *Id.* at 68. Orwig also stated

that all twelve jurors were still together in the courthouse after the judge was informed that there were signed verdicts. *Id.* at 76. *See also* RX 294, at 167 (bailiff testimony).

Gribek testified that the jury was never assembled in open court to be excused or discharged. *Id.* at 64. Orwig also testified that the entire jury was never placed in the jury box or the courtroom, and that the judge never made an announcement of the mistrial in front of the parties in the courtroom with the jury present. *Id.* at 75. *See also* RX 293, at 15-16. Orwig testified that the judge did not provide him with an opportunity to make a record that the jury had signed verdicts. *Id.* at 76.

After the trial judge spoke with the five jurors, she then spoke with a newspaper reporter in her chambers. (RX 294, at 118, 186.) Counsel tried to speak with the judge after the jurors left her chambers, but was advised to wait until she had finished speaking with the reporter. While the judge was speaking with the newspaper reporter, the jurors were being taken out of the courthouse and released. *Id.* at 135, 186.

Judge Bond testified about the issue of notification to counsel:

> Q. Had you told us about the verdicts, that is the defense, we probably would have asked you to record those verdicts; is that correct?
>
> A. I don't know what you would have asked me.
>
> Q. As you sit here today, had you told us after

you talked to the juror and were told there were verdicts of not guilty rendered, you don't believe that we would have asked you to record those verdicts?

A. Counsel came in and I gave him the verdicts. He didn't ask me to record anything.

Q. Well, let's talk about that. If you have told us at the time when all the jurors were there, don't you believe we would have asked you to record the verdicts.

A. I'm sure you would have.

Q. And had we asked you to record the verdicts and all the jurors had been there then we would have had a discussion on the record with the jurors there about exactly what happened; is that correct?

A. I doubt it.

Q. You would not have conducted such a hearing?

A. The trial was over. We were finished.

(RX 294, H.Tr., at 116-117.) Judge Bond testified that, after she learned that there were "not guilty" verdicts, she could not have taken the verdicts in open court because the jury had been discharged and the case was adjourned. Even if she had reassembled the jury, she could not have accepted the verdicts because they were tainted. *Id.* at 108. Judge Bond testified that the juror in question would have had to have disregarded her instructions concerning outside information to learn about the

polygraph. *Id.* at 109. In addition, the note also indicated that the juror was refusing to deliberate in good faith. *Id.* at 110.

3. Ruling on motion to bar re-trial

Following the evidentiary hearing, the Summit County Court of Common Pleas (Cirigliano, J.) granted the motion to bar retrial on double jeopardy grounds. (Doc. 35, RX 229, order of Feb. 15, 2002; doc. 7, PX A.)

The court recognized that when a mistrial has been declared without the defendant's consent, double jeopardy bars re-trial if there was no manifest necessity for ordering a mistrial, or the ends of public justice would otherwise be defeated. *Id.* at 11. The court noted that the burden is on the prosecution to establish that manifest necessity existed. *Id.* at 12 (citing *Washington*, 434 U.S. at 505; *Glover v. Macknin*, 950 F.2d 1236, 1242 (6th Cir.1991)). The court asserted that any doubt must be resolved in favor of the defendant. *Id.* (citing *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963)). The court set forth various legal factors which must be considered in deciding whether to grant a mistrial. *Id.* at 11-14.

The court ruled:

> In the present case there existed no manifest necessity for declaring a mistrial. Reasonable alternatives to a mistrial existed and the public interest in fair trials designed to end in just judgments was not met by the trial court's declaration of a mistrial. The trial court abused

> its discretion in declaring a mistrial because it failed to investigate the information set forth in the jury note, it failed to explore alternatives to declaring a mistrial, it failed to take into consideration the verdicts that had been reached by the jury, it failed to ascertain whether any prejudice existed as a result of the information related in the foreperson's note, it failed to attempt to cure any taint which may have existed, it acted precipitately in the declaration of a mistrial, and it failed to duly consider the defendant's right to have his trial completed by a particular tribunal, especially in light of the fact that this is a capital case.

Id. at 15-16. Thus, the motion to bar a re-trial on double jeopardy grounds was granted. *Id.* at 16.

C. Appeal of Trial Court's Ruling to Bar Re-Trial

The state appealed the court's ruling, setting forth two assignments of error. The first assignment of error was: "The second trial court's dismissal on double jeopardy grounds is a nullity because the second trial court acted without jurisdiction and in violation of the Ohio Constitution when it reviewed and reversed the discretionary decision of the first trial court." (Doc. 35, RX 300, at 8.) The court of appeals rejected the argument that the trial court did not have jurisdiction to rule on the motion. The court recognized that "[t]he issue of double jeopardy following a trial court's sua sponte declaration of a mistrial is routinely raised through a motion to bar retrial." (Doc. 35, RX 312, at ¶ 16; *State*

v. *Ross*, No. 20980, 2002 WL 31890088, at *3 (Ohio Ct.App. Dec. 31, 2002).)

The second assignment of error was dispositive: "The second trial court's dismissal on double jeopardy grounds is a nullity because the first trial court acted within [its] discretion by declaring a mistrial sua sponte." (Doc. 35, RX 300, at 14.) The state's memorandum in support was based primarily on this proposition. *See generally* RX 300 (appellant's brief). The state only briefly asserted that "there was a high degree of necessity for declaring a mistrial," basing this argument on the theory that "Ohio law limits the ability of courts to investigate juror misconduct during deliberations." *Id.* at 18-19.

In addressing the second assignment of error, the court of appeals stated:

> This Court has found no authority for reviewing the propriety of a mistrial decision based on an evidentiary hearing held nearly seven months after the decision was made. On the contrary, the mistrial decision should be evaluated on the record that was prepared at that time. Consequently, this Court confines its review to the record of October 28, 2000.

(RX 312, at ¶ 20; *Ross*, 2002 WL 31890088, at *3 (internal citations omitted).)

Next, the court looked to the standard of review, and concluded that the finding that there was no manifest necessity for a mistrial was a legal conclusion to be reviewed de novo. *Id.* at ¶ 27. The court of appeals concluded that the lower court

"committed reversible error in finding that there was no manifest necessity for a mistrial." *Id.*

The appellate court reasoned that the lower court "improperly equated 'manifest necessity' with absolute necessity." *Id.* at ¶ 28. The court stated that the U.S. Supreme Court, in both *Arizona v. Washington* and *United States v. Jorn*, "made it clear that a trial court abuses its discretion by declaring a mistrial without considering *any* alternatives; it did not hold that the trial court must rule out all possible alternatives before declaring a mistrial." Id. The court found that the record of the case "demonstrate[d] that the trial judge allowed the parties to state their positions, considered their competing interests, and made a thorough inquiry into reasonable alternatives prior to declaring a mistrial in this case." *Id.* at ¶29.

The court did not directly address the prosecution's burden in pursuing a second prosecution, but stated:

> Ross and the visiting judge repeatedly emphasized the fact that the prosecution did not argue that the State's interests were at stake but spoke only of the potential prejudice to Ross, suggesting that such a failure somehow waived the State's interest or removed it from the mistrial balancing test.

Id. at ¶35.

The court of appeals reversed: "The visiting judge, based on an incorrect legal standard, erred in finding that there was no manifest necessity for a

mistrial." The case was remanded for retrial. (Doc. 35, RX 312, at ¶ 52; *Ross*, 2002 WL 31890088, at *10.)

II. PETITION FOR WRIT OF HABEAS CORPUS

Ross filed a petition for a writ of habeas corpus on May 6, 2004. The petition alleges that Ross is a person subject to unlawful future custody pursuant to this judgment of the Ohio Court of Appeals, and that the court's decision violates the Constitutional protection against double jeopardy. (Doc. 1, at 4.) Ross requested that this district court stay the pending criminal proceedings against him in state court. *Id.* at 1.

Ross argues that the state appellate court acted contrary to clearly established federal law by holding that he could be prosecuted a second time following an acquittal. *Id.* at 38-39. He also claims that the state appellate court acted in violation of the Due Process Clause by its "unfair and arbitrary judicial action," that is, by rendering an arbitrary decision. *Id.* at 39-42 (citing *Rogers v. Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001)). Further, he alleges that the appellate court acted contrary to clearly established federal law by holding that he did not have a constitutional right to a pretrial evidentiary hearing in support of his double jeopardy claim. *Id.* at 42-45.

Ross also claims that the state appellate court acted contrary to clearly established federal law by "absolving the trial judge of her duty to exercise sound discretion by declaring a mistrial." *Id.* at 45-53. It is also argued that the state court "acted contrary to clearly established federal law in holding that the

trial court could force Petitioner to choose between his double jeopardy rights and his impartial jury rights," where there was no "cognizable hardship" on the prosecution. *Id.* at 53-57. In addition, Ross accuses that the state court of appeals of "holding that a trial judge may order a mistrial over the objection of a defendant for the sole purpose of preventing an acquittal." *Id.* at 57-59.

Finally, the petition asserts that the state appellate court's application of federal law was "objectively unreasonable." *Id.* at 60-61. Ross also argues that the court's conclusion that the (first) trial judge sufficiently considered his double jeopardy interests before declaring a mistrial was "an unreasonable determination of the facts in light of the evidence presented at the state court [evidentiary] proceeding." *Id.* at 61-64 (citing *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

Ross was granted leave to amend his petition[3] to add an additional ground (doc. 43), that his double jeopardy rights will be violated because the state refuses to acknowledge that he has been lawfully acquitted. (Doc. 32, at 2.) This claim is based on the trial court's denial of his motion to perfect the verdict. *Id.* at 4.

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[3] The amended petition (doc. 57) is identical to the original, with the exception of the added claim, which is appended at pp. 62-68. *Compare* doc. 1, ¶¶ 1-174, with doc. 57, ¶¶ 1-174.

III. HABEAS CORPUS REVIEW

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254, which provides the standard of review that federal courts must apply when considering applications for a writ of habeas corpus. Under the AEDPA, federal courts have limited power to issue a writ of habeas corpus with respect to any claim which was adjudicated on the merits by a state court. The Supreme Court, in *Williams v. Taylor*, provided the following guidance:

> Under §2254(d)(1), the writ may issue only if one of the following two conditions is satisfied-the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but

unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2002). *See also Lorraine v. Coyle*, 291 F.3d 416, 421-422 (6th Cir.2002), *cert. denied*, 538 U.S. 947, 123 S.Ct. 1621, 155 L.Ed.2d 489 (2003).

A state court decision is "contrary to" clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Williams*, 529 U.S. at 405. *See also Price v. Vincent*, 538 U.S. 634, 640, 123 S.Ct. 1848, 155 L.Ed.2d 877 (2003).

A state court decision is not unreasonable simply because the federal court considers the state decision to be erroneous or incorrect. Rather, the federal court must determine that the state court decision is an objectively unreasonable application of federal law. *Williams*, 529 U.S. at 410-12; *Lorraine*, 291 F.3d at 422.

IV. PETITIONER'S REPRESENTATION OF APPELLATE COURT OPINION

Several claims in the petition misrepresent the holding of the state court of appeals. For example, Ross contends that the state court held "he could be prosecuted a second time following an acquittal." (Doc. 1, at 38.) Such a ruling would arguably present a clear constitutional violation, had the appellate court so held. However, the state as appellant did not present this issue to the court of appeals for a determination, and a plain reading of the court's opinion does not reveal that the court

stated in any manner that Ross "could be prosecuted a second time following an acquittal." *See generally* Doc. 35, RX 312; *Ross*, 2002 WL 31890088. Ross provides no citation to the opinion supporting his assertion. *See* doc. 1, at 38, ¶ 103.

Ross also claims that the state court of appeals held that "he did not have a constitutional right to a pretrial evidentiary hearing in support of his double jeopardy claim." He argues that the court ruled that the evidentiary hearing was "unlawful." *See* doc. 1, at 43, ¶ 119. Reference to the appellate court's opinion reveals the following: "This Court has found no authority for reviewing the propriety of a mistrial decision based on an evidentiary hearing held nearly seven months after the decision was made. On the contrary, the mistrial decision should be evaluated on the record that was prepared at that time." Doc. 35, RX 312, at 8; *Ross*, 2002 WL 31890088, at *3. Thus, the court limited the permissible scope of the hearing, rather than holding that defendant was not entitled to a hearing.

Ross accuses the state court of "holding that a trial judge may order a mistrial over the objection of a defendant for the sole purpose of preventing an acquittal." (Doc. 1, at 57.) Needless to say, the state did not present this issue to the court of appeals for determination. The position of the appellate court was that the purported verdicts were not to be considered, as "information that was discovered after the mistrial was declared." Doc. 35, RX 312, at 16; *Ross*, 2002 WL 31890088, at *7 n. 3. The court emphasized that "it confine[d] its review to the

record prepared at the time the decision was made." *Id.* The court certainly did not hold that "a trial judge may order a mistrial over the objection of a defendant for the sole purpose of preventing an acquittal."

The petition for a writ of habeas corpus will not be granted on any of the aforementioned grounds. However, the court finds that the remaining double jeopardy claims warrant further discussion.

V. DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the Constitution protects a defendant from being placed in jeopardy twice for the same offense. *Washington,* 434 U.S. at 503 (citing *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)). "The prohibition is not against being twice punished, but against being twice put in jeopardy." *Price v. Georgia,* 398 U.S. 323, 326, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) (quoting *Ball v. United States,* 163 U.S. 662, 669, 16 S.Ct. 1192, 41 L.Ed. 300 (1896)). In Fifth Amendment terms, "jeopardy" denotes the risk of criminal prosecution. *Breed v. Jones,* 421 U.S. 519, 528, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975). A criminal defendant is placed in jeopardy once the defendant is put on trial before the trier of the facts, whether jury or judge. *United States v. Jorn,* 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).

"The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an

acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation." ' *Washington*, 434 U.S. at 503 (citing *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962)). Thus, where the innocence of the defendant has been confirmed by a final judgment, there is a conclusive presumption that a second trial would be unfair. Id.

Because jeopardy attaches before a judgment becomes final, the defendant has a "valued right to have his trial completed by a particular tribunal."*Washington*, 434 U.S. at 503. Thus, where a trial is aborted before it is completed, the prosecution generally is limited "to one, and only one, opportunity to require an accused to stand trial." *Id.* at 504-505.

A. Supreme Court Case Law on Mistrial and Double Jeopardy

The protection afforded by the Double Jeopardy Clause is less absolute in cases of mistrial than in cases of acquittal:

> Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by

> a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

Washington, 434 U.S. at 505. In cases of mistrial, the "established rule" is that retrial is barred unless the defendant consented to the mistrial, or there was "manifest necessity" for the mistrial. *Johnson v. Karnes*, 198 F.3d 589, 594 (6th Cir.1999); *Harpster*, 128 F.3d at 327-328; *Gilliam v. Foster*, 75 F.3d 881, 893 (4th Cir.1996) (en banc); *Corey*, 917 F.2d at 90.

The Supreme Court has "for the most part, explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial." *Jorn*, 400 U.S. at 480. In general, the Court has attempted to apply the principles set out by Justice Story in *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824), on the situation of re-trial after a mistrial has been declared without the defendant's consent. *Id.* at 480-481.

In *Perez*, courts are counseled to exercise "sound discretion" to declare a mistrial only in cases where there is "a manifest necessity for the act, or

the ends of public justice would otherwise be defeated." *Id.* at 481 (quoting *Perez*). In exercising this authority, *Perez* instructs that "the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner." *Id. See, e.g., Johnson,* 198 F.3d at 594.

In *Washington,* the Supreme Court emphasized that the prosecutor has a heavy burden to "demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." *Washington,* 434 U.S. at 505. The Court noted that "there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Id.* at 506. The manifest necessity doctrine does not require a reviewing court to find that the trial court had no alternative but to declare a mistrial. *Harpster,* 128 F.3d at 328.

The *Washington* Court noted that whether the requisite "high degree" had been satisfied was an easier question in some cases than in others. At one extreme are those cases where a prosecutor seeks a mistrial when it appears the evidence is insufficient to convict. *Washington,* 434 U.S. at 507; *United States v. Stevens,* 177 F.3d 579, 587 (6th Cir.1999). At the other extreme are cases of jury deadlock, "the classic basis for a proper mistrial." *Id.* at 509. The decision to declare a mistrial where the jury is deadlocked is accorded great deference by a reviewing court. *Id.* at 510.

In *Washington*, the trial judge ordered a mistrial because the defense made improper and prejudicial remarks during his opening statement. *Id.* at 510. The Court said that, in a strict sense, the mistrial was not "necessary," but the Court recognized the propriety of according "the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *Id.* at 511. The Court stated that an improper opening statement creates the risk that the entire panel may be tainted, as opposed to "individual juror bias, [where] it may be possible to replace that juror with an alternate." *Id.* at 512-513.

The conclusion that a particular decision to declare a mistrial is entitled to a certain level of deference does not end the inquiry:

> The trial judge ... "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn*, 400 U.S., at 486, 91 S.Ct., at 558 (Harlan, J.). In order to ensure that this interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised "sound discretion" in declaring a mistrial.
>
> Thus, if a trial judge acts irrationally or

irresponsibly, cf. *United States v. Jorn, supra; see Illinois v. Somerville,* 410 U.S., at 469, 93 S.Ct., at 1072, his action cannot be condoned.

Id. at 514. *See also Johnson,* 198 F.3d at 594-595; *Harpster,* 128 F.3d at 328.

The Court in *Jorn* stressed that "the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial." *Jorn,* 400 U.S. at 485. In the absence of a defense motion for mistrial, the doctrine of manifest necessity "stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *Id.* The Court emphasized again that, "in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Id.* at 486.

In *Jorn,* the Court affirmed the district court's dismissal, on double jeopardy grounds, of a second prosecution of a tax fraud case, after a mistrial. The Court noted that the first trial judge acted "abruptly," and found it "abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances

into account, there was a manifest necessity for the sua sponte declaration of this mistrial." *Id.* at 487.

The Sixth Circuit has gleaned a "general approach" to the question of "manifest necessity" from the Supreme Court's decision in *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973):

> The Court held that "[a] trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." These two criteria explain most, but not all, of the circumstances in which federal courts have permitted re-prosecution following a mistrial.

Stevens, 177 F.3d at 584 (quoting *Somerville*, 410 U.S. at 464). The first category includes cases of a hung jury, as well as "cases in which the jury is incurably tainted." *Id.* The second category covers cases of serious error which would guarantee reversal of any conviction. *Id.*

Where a trial judge has identified possible juror bias as the basis for a declaration of mistrial, that "determination is entitled to special respect." *Brady v. Samaha*, 667 F.2d 224, 228 (1st Cir.1981) (quoting *Washington*, 434 U.S. at 510). Nonetheless, the role of a reviewing court is to ensure "that the trial judge engaged in a 'scrupulous exercise of judicial discretion' in making the decision that a mistrial was necessary." *Id.* (quoting *Jorn*, 400 U.S. at 485).

Significant in that determination is whether or not the record indicates that the judge considered alternatives to a mistrial. *Id.* at 229 (citing *Jorn*, 400 U.S. at 487, and other cases). *See also, Gilliam*, 75 F.3d at 895 (appropriate consideration to alternatives less drastic than mistrial). Also of major importance is affording counsel an opportunity to be heard on the subject. *Id.* (citing *Washington*, 434 U.S. at 514-515 n. 34, and other cases).

A major concern is "the amount of time devoted by the judge to the mistrial decision. A precipitate decision, reflected by a rapid sequence of events culminating in a declaration of mistrial, would tend to indicate insufficient concern for the defendant's constitutional protection." *Id.* (citing *Jorn*, 400 U.S. at 487, and other cases). If the record reveals that the trial judge has failed to engage in a scrupulous exercise of discretion, there has been an abuse of the "sound discretion" entrusted to her. *Id.*

B. Cases Applying Supreme Court Precedent

Several circuit court cases illustrate the application of a scrupulous exercise of sound judicial discretion in determining whether a high degree of manifest necessity existed to support a mistrial.

In *Brady v. Samaha*, the trial court declared a mistrial where several of the defendants continually attempted to inject the "competing harms" doctrine into their defense for criminal trespass at a nuclear power plant, after the judge had explicitly ruled that evidence inadmissible. The First Circuit found that the actions of the trial court indicated "anything but

deliberation and concern for the defendants' protected interest in completing the trial." The court was troubled that the judge did not confer with counsel before declaring a mistrial. In addition:

> Nor did the trial judge consider any alternatives to a mistrial, such as severance or curative instructions. The rapid sequence of events during the morning of his final encounter with the defendants reflects a spontaneous decision that could hardly be the result of scrupulously sound discretion. On the contrary, the apparent failure of the judge to consider alternatives and the abruptness with which he acted resemble the actions of the trial judge "that can fairly be described as erratic" denounced in *United States v. Jorn. Illinois v. Somerville,* 410 U.S. at 469, 93 S.Ct. at 1073. "(T)he pace at which the proceedings culminating in the judge's declaration of a mistrial moved indicates that the judge could not possibly have considered carefully any alternatives to declaring a mistrial. It was only a matter of minutes...." *Grandberry v. Bonner,* 653 F.2d [1010,] 1015 [5th Cir.1981]. In sum, a decision obviously made so precipitately could not have been the product of any careful consideration of the valued right of the defendants to have their guilt or innocence determined at that trial. *United States v. Jorn,* 400 U.S. at 486, 91 S.Ct. at 557; *Grandberry v. Bonner,* supra; *United States v. Starling,* 571 F.2d [934,] 941 [5th Cir.1978].

Brady, 667 F.2d at 230. The court vacated the denial of the writ.

In *Johnson v. Karnes*, the Sixth Circuit reversed the denial of a habeas petition because it found that "the state trial court's decision to grant a mistrial was ... an 'unreasonable application' of the Supreme Court's 'manifest necessity' standards." *Johnson*, 198 F.3d at 593. In *Johnson*, the defendant was re-tried for kidnapping and felonious assault, following a hung jury on those counts. The first trial had resulted in an acquittal on aggravated robbery and aggravated burglary charges arising out of the same incident. In the second trial, defense counsel referred, on cross-examination of the victim, to the earlier acquittal on robbery charges, and the judge declared a mistrial. *Id.* at 591-592.

The *Johnson* court found that the trial judge did not exercise "sound discretion" in declaring that a mistrial was manifestly necessary. *Id.* at 595. The court said that the trial judge pressured the parties by only allowing "a very brief recess before listening to counsel's arguments regarding the mistrial." The court also found that the trial court failed to seriously consider alternatives to declaring a mistrial. *Id.* The court pointed out that those cases "in which we have found that the trial judge exercised 'sound discretion' in finding that manifest necessity compelled a mistrial, the trial judge engaged in 'careful consideration and solicitude for the serious consequences attendant upon mistrials ..." *Id.* at 596 (citing cases). The court continued:

The care taken by the state trial judge here

falls well below that exercised in the aforementioned cases. The judge made his decision after granting only a short recess and listening to brief arguments by both parties ... The State failed to articulate why manifest necessity required a mistrial. We further find it significant that the trial court judge failed to consider less drastic alternatives, but instead immediately decided that a mistrial was appropriate.

* * * * *

Accordingly, we believe that the trial judge failed to act rationally, responsibly or deliberately, and thus failed to exercise sound discretion as required by *Perez* and its progeny.

* * * * *

We find that this case also lacked such "urgent circumstances" as are required to justify a mistrial. For example, defense counsel explained that he believed that he had a legitimate basis on which to ask the question.... Moreover, the prosecutor merely objected to the question; he did not initially request a mistrial and he further expressed double jeopardy concerns once the trial judge intimated that he was inclined to declare a mistrial. Thus, we conclude that manifest necessity did not warrant a mistrial.

Id. at 596-597.

In *Corey v. District Ct. of Vermont*, the trial judge had declared a mistrial, after the sheriff in charge of the jury had improper contact with the jury during their deliberations. The court's ruling was based on Vermont state law "requiring a new trial for a defendant convicted after the jury, during its deliberations, is exposed to misconduct by the sheriff in charge of the jury even absent any showing that the jury was affected by the misconduct." *Corey*, 917 F.2d at 91. The judge had told counsel, in chambers, that he was going to declare a mistrial, but that it should be done in open court. *Id.* at 89. At that point, before the judge and counsel had returned to the courtroom, the jury reported that it had reached a verdict. Defense counsel then requested that the court reconsider declaring a mistrial. *Id.*

The trial judge declared the mistrial, but had the verdict reported for the purpose of completing the record. The jury reached verdicts of not guilty on every count. The defendant's post-trial motion for acquittal was denied by the state courts. Subsequently, the district court dismissed the defendant's petition for a writ of habeas corpus. *Id.* at 89.

The Second Circuit reversed, finding that "manifest necessity sufficient to escape the Double Jeopardy Clause's bar of a second trial did not exist once the trial judge learned that the jury had reached a verdict and that the verdict was not guilty." *Id.* at 89. The circuit court stated that the trial judge had been prudent to raise the issue of mistrial

sua sponte, but ruled that "the trial court erred, in our view, when it refused to take into consideration the change in circumstances resulting from the jury's announcement that a verdict had been reached." *Id.* at 91.

The appellate court pointed out that the state did not articulate any prejudice to its own case; rather, the prosecutor stated that certain comments made by the sheriff appeared prejudicial to the defendant. The court noted: "Even if we could imagine some prejudice to the prosecution, the burden remains on the state to establish the basis for a finding of manifest necessity." *Id.* (citing *Washington,* 434 U.S. at 505.)

Moreover, a "mechanistic" application of the Vermont rule was insufficient in light of the requirements of the Double Jeopardy Clause. *Id.* The court was not swayed by the fact that the trial judge had stated his intention to declare a mistrial before the jury notified the court of its verdicts. The Second Circuit reasoned as follows:

> When [the jury] reached its verdict, the trial judge was given a unique opportunity. An acquittal would reveal the absence of prejudice to the defendant. With no prejudice to the defendant and no articulation of any prejudice by the state to its case, the only remaining basis for a finding of manifest necessity would be the public interest in a trial free of even the perception of an inappropriate influence on the jury. Nevertheless, the limited public interest in

having a trial free of *all* possible taint, whether prejudicial or not, by itself cannot overcome Corey's constitutionally protected "valued right to have his trial completed by a particular tribunal." The trial judge therefore should have accepted the verdict. If the verdict were guilty, the court, concluding that the sheriff's conduct indeed could have prejudiced Corey, then could have properly ordered a new trial under Vermont law. Because the verdict was not guilty, however, there was at that time no manifest necessity for the mistrial.

Id. at 91-92 (internal citation omitted).

The Second Circuit concluded:

... once the jury has reached a verdict before it is discharged and the prosecution does not claim prejudice, the context in which the decision regarding the existence of manifest necessity is made has substantially changed. The trial court no longer has to speculate about the possible impact of misconduct affecting the jury. The trial court can look to the verdict for an answer. The failure to take into account the jury's verdict in this case constitutes an abuse of discretion.

Id. at 92. The court reversed, and remanded with instructions to issue a writ of habeas corpus.

C. Analysis of Manifest Necessity Standard

As a preliminary matter, the court notes that the parties have expended a great deal of effort to

convince the court that Ross is either guilty[4] or not guilty[5] of the charges against him.[6] This court noted in an earlier ruling, doc. 49, at 3, that Ross does not press a claim of actual innocence. *See generally Herrera v. Collins*, 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). This court's focus is not on whether the evidence at trial would support a jury finding of guilty or not guilty. Rather, this court must determine whether the decision of the Ohio Court of Appeals was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d); *Williams*, 529 U.S. at 412-13.

Ross claims that the state court of appeals erred in reversing the trial court's grant of his motion to deny a second trial, on double jeopardy grounds. *See generally* doc. 1, at 2-3. The petition claims error by the court of appeals. This court must focus on the appellate decision, and the issue of re-trial.

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[4] For example: "Respondents submit to this Honorable Court that Denny Ross murdered Hannah Hill." (Doc 33, at 5, 10-12).

[5] For example: "The evidence at trial was insufficient to support a conviction." (Doc. 1, at 15-17; doc. 40, at 8-16.)

[6] In any event, the constitutional protection against double jeopardy is so strong that it would even protect an acquittal which is "based upon an egregiously erroneous foundation." *Washington*, 434 U.S. at 503.

Naturally, the mistrial and the surrounding circumstances are relevant, but it is not the mistrial decision itself which is the subject of the habeas petition, but rather the appellate court decision reversing the grant of the motion to bar re-trial.

In *Arizona v. Washington*, the Supreme Court was not addressing the propriety of the mistrial in the context of a direct criminal appeal. Instead, as here, the Court was resolving a petition for habeas corpus which specifically sought to bar re-trial, after a mistrial. Thus, where the Court stated that the prosecutor has a heavy burden to "demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant," the burden does not pertain to justifying the mistrial in some abstract sense. *Washington*, 434 U.S. at 505. Rather, the Court found that "the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar" to a second prosecution and a second trial. *Id.*

The first trial court (Judge Bond) declared the mistrial sua sponte. The prosecution had no burden to support the mistrial at that point, that is, at the trial stage. However, when the state chose to re-try Ross, it assumed the burden of demonstrating "manifest necessity" for the mistrial, in light of the importance of the Double Jeopardy Clause, in order to proceed with a second trial. *Washington*, 434 U.S. at 505. Thus, the purpose of the evidentiary hearing was not to sit in judgment on, or to somehow invalidate, the decision to declare a mistrial, but instead to resolve the motion to bar re-trial. In that context, the

relevant burden was the prosecution's, to support retrial, not Judge Bond's to support the original mistrial. *See* RX 312, at ¶ 53; *Ross*, 2002 WL 31890088, at *11 (Baird, J., dissenting).

Following that hearing, the motion to bar a retrial on double jeopardy grounds was granted. (Doc. 35, RX 229, at 16.) The court of appeals reversed, finding that the visiting judge, "based on an incorrect legal standard, erred in finding that there was no manifest necessity for a mistrial." (Doc. 35, RX 312, at ¶ 52.) Although the court of appeals identified relevant Supreme Court cases on double jeopardy, the court applied a legal standard regarding the burden of establishing "manifest necessity" contrary to that set forth in those cases.

Supreme Court precedent makes it clear that the determination of whether a person should be placed in jeopardy a second time when a criminal proceeding is prematurely ended requires an analysis that must balance competing interests and is almost always so fact specific that the exercise of sound discretion must be evaluated on a case by case basis. The leading cases concerning mistrials entered other than at the behest of the defendant have occurred at various stages of the prosecution. As such, the timing of the event that causes the need to consider the mistrial is a factor in determining whether the court exercised its discretion appropriately. Here, the court of appeals appears to have failed to require the prosecution to demonstrate how the trial judge's decision to grant the mistrial was the product of manifest necessity.

Whether their failure to do so is, arguably, rendered meaningless because the court went on to evaluate the trial judge's conduct and concluded that manifest necessity was established within the meaning of *Arizona v. Washington* will be further considered in Section VI of this Report and Recommendation.

The state court of appeals, in discussing the standard of review it would apply, quoted extensively from *United States v. Keene*, 287 F.3d 229, 233-234 (1st Cir.2002). (Doc. 35, RX 312, at ¶¶ 24-26.) *Keene* was an interlocutory appeal of an order refusing to dismiss an indictment on double jeopardy grounds. In *Keene*, the First Circuit cautioned that review for abuse of discretion of a motion to dismiss on double jeopardy grounds, in the wake of the declaration of a mistrial, "entails heightened rigor." *Keene*, 287 F.3d at 233 (citing *Jorn*, 400 U.S. at 485). The *Keene* court also affirmed that "the prosecution bears the burden of justifying the declaration of a mistrial in a criminal case." *Id.* at 234 (citing *Washington*, 434 U.S. at 505).

Nonetheless, the state court of appeals nowhere discussed the prosecution's burden.[7] Ross points out that the court was required to exercise sound discretion. *See* doc. 1, at 44-45. Instead, the appellate court applied a more deferential abuse of

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[7] The lower court, on the other hand, plainly stated: "The burden is on the prosecution to establish that manifest necessity existed." RX 229, at 12 (citing *Washington*, 434 U.S. at 505).

discretion standard, apparently based on state law. *See, e.g,* doc. 35, RX 312, at ¶ 22 (quoting *State v. Widner,* 68 Ohio St.2d 188, 190, 429 N.E.2d 1065 (1981), *cert. denied,* 456 U.S. 934, 102 S.Ct. 1988, 72 L.Ed.2d 452 (1982)). The *Widner* court had characterized the "controlling precedent" of the U.S. Supreme Court in the following terms: "... the court has deferred to the trial court's exercise of discretion in light of all the surrounding circumstances." *Widner,* 68 Ohio St.2d at 190, 429 N.E.2d at 1066. *See, e.g,* doc. 35, RX 312, at ¶ 52 (finding no abuse of discretion). This expression of deference guided the appellate court's decision in this case.

This deferential approach is contrary to the scrutiny mandated by U.S. Supreme Court precedent. *See* doc. 1, at 45-49; doc. 40, at 39-41. In *Williams,* the Supreme Court pointed out that "[t]he word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.' " *Williams,* 529 U.S. at 406. In other words, for the writ to issue, "the state court's decision must be substantially different from the relevant precedent of this Court." *Id.*

As discussed earlier, *Washington* emphasized that a prosecutor has a heavy burden to demonstrate "manifest necessity," that is, a "high degree" of necessity, for the mistrial before proceeding with a second prosecution after a mistrial declared over the objection of the defendant. *Washington,* 434 U.S. at 505-506. *Perez* requires a court to exercise "sound discretion"

before declaring a mistrial, a power which should be used only "with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Perez*, 22 U.S. (9 Wheat.) at 580. *Jorn* explained that "manifest necessity" involves "a scrupulous exercise of judicial discretion," which recognizes "the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Jorn*, 400 U.S. at 485-486.

The review undertaken by the court of appeals here was "substantially different" from that required by Supreme Court precedent, in the degree of deference it accorded to the mistrial determination. The court did not focus on whether the prosecutor established a manifest necessity supporting the mistrial, instead stating, for example:

> Ross and the visiting judge repeatedly emphasized the fact that the prosecution did not argue that the State's interests were at stake but spoke only of the potential prejudice to Ross, suggesting that such a failure somehow waived the State's interest or removed it from the mistrial balancing test.

RX 312, at ¶ 35.

The fact that another trial judge may have handled the situation differently, or that, in hindsight, defense counsel would have the trial judge consider additional alternatives, does not demonstrate that the original trial judge abused her discretion in determining that a mistrial was necessary.

Id. at ¶ 52. Throughout the opinion, the focus is on what Ross argued, rather than on the prosecutor's burden.

The respondent asserts that "because the State was in the position of being the appellant to the ... Court of Appeals, it is clear that the State had the burden of persuasion on appeal in arguing that a manifest necessity for mistrial existed." (Doc. 33, at 48.) However, the state's successful argument on appeal was that the "dismissal on double jeopardy grounds is a nullity because the first trial court acted within [its] discretion by declaring a mistrial sua sponte." (Doc. 35, RX 300, at 14.) The state urged the appellate court to apply "great deference to the trial court's discretion." *Id.* The state argued that Judge Cirigliano "did not even have the jurisdictional authority to inappropriately second-guess the first trial court." *Id.* at 17. While the state did address the issue of manifest necessity, *id.* at 18-19, their appeal relied for the most part on an "abuse of discretion" standard. The conclusion to their brief is telling:

> ... the second trial court's ... ruling is a nullity because the second trial court lacked jurisdiction to review and reverse the first trial court's discretionary decision. Furthermore, the first trial court did not abuse her discretion by declaring a sua sponte mistrial.

Id. at 24.

The state appellate court's application of the manifest necessity standard to the trial court's ruling was contrary to clearly established Federal law, as

determined by the Supreme Court of the United States. *See, e.g., Washington,* 434 U.S. at 505-506 (prosecutor has heavy burden to demonstrate "high degree" of necessity); *Jorn,* 400 U.S. at 485-486; *Perez,* 22 U.S. (9 Wheat.) at 580; *Keene,* 287 F.3d at 233 (review of motion to dismiss on double jeopardy grounds "entails heightened rigor"); *Corey,* 917 F.2d at 91 (burden on state to establish manifest necessity). The state court's adjudication resulted in a remand for a second trial, in violation of the petitioner's protections under the Double Jeopardy Clause.

D. Reservation of Option to Mistrial

Ross contends that the court of appeals "acted contrary to clearly established federal law in holding that the trial court could force Petitioner to chose between his double jeopardy rights and his impartial jury rights," where there would have been no "cognizable hardship" on the prosecution. (Doc. 1, at 53.) Ross claims that the trial court required him to waive any error in order to proceed to a verdict. In support of his argument he cites *United States v. Dinitz,* 424 U.S. 600, 610, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

This issue has its basis in the defendant's request that "the jury be instructed to continue to deliberate, a verdict be rendered with the defense option of a mistrial if the decision were to be unfavorable," which the trial court rejected as "fundamentally unfair to the State." (RX 292, Tr., at 1268.) The defense had argued that "the extra judicial evidence that exists in the jury room is not

evidence that is favorable to the defense and hence we believe a verdict of not guilty would not be tainted." *Id.*

The court of appeals referred to this issue in its discussion of whether the trial court had adequately considered the parties' proposed alternatives. The court found no error in the trial court's rejection of this proposal, finding that, "[b]ecause the interests of both Ross and the State were implicated by the foreperson's note," the trial court acted reasonably in considering the State's interests by so ruling. (Doc. 35, RX 312, at ¶¶ 43-44; *Ross*, 2002 WL 31890088, at *8.)

The court's ruling is not contrary to *United States v. Dinitz*. A state court decision is "contrary to" clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Williams*, 529 U.S. at 405. In *Dinitz*, the Court held that the state court's application of the manifest necessity standard to a mistrial motion where the defendant requested the mistrial was error. *Dinitz*, 424 U.S. at 610.

The question in *Dinitz* was "whether the Double Jeopardy Clause of the Fifth Amendment was violated by the retrial of the respondent after his original trial had ended in a mistrial granted at his request." *Dinitz*, 424 U.S. at 601. The Court reversed, finding that the state court erred in ruling that the retrial violated the respondent's double jeopardy rights. *Id.* at 611-612.

The Supreme Court noted that "[t]he

distinction between mistrials declared by the court Sua sponte and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause." *Id.* at 608. The Court pointed out that "[e]ven when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire 'to go to the first jury and, perhaps, end the dispute then and there with an acquittal." ' *Id.* (quoting *Jorn*, 400 U.S. at 484). The Court also noted that "it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury." *Id.*

The obvious distinction between *Dinitz* and the case at hand is that Ross did not request a mistrial based on the juror's note which formed the basis of the trial court's ultimate ruling, but rather opposed one. In addition, although prosecutorial misconduct was a possible source of the alleged jury taint in this case, it had not been established as such. *Dinitz* recognized that a defendant faces "a 'Hobson's choice' between giving up his first jury and continuing a trial [which is] tainted by prejudicial judicial or prosecutorial error." *Id.* at 609. The court stressed that "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *Id.*

As to the specific argument advanced by Ross here, the *Dinitz* Court did not hold that a

defendant could request that the jury continue to a verdict in the manner requested by Ross, that is, reserving the option for a mistrial dependent on the outcome of the jury deliberations. Thus, this court cannot find that the state court's contested ruling contradicted the governing law set forth in *United States v. Dinitz.*

VI. UNREASONABLE APPLICATION

Ross contends that the state court's application of federal law was "objectively unreasonable" because the court failed to properly apply the correct rules of law. (Doc. 1, at 60-61.) A state court decision is not "unreasonable" simply because this court considers the decision to be erroneous or incorrect. Rather, in order to grant habeas relief, this court must find that the state court decision is an objectively unreasonable application of federal law. *Williams,* 529 U.S. at 410-12; *Lorraine,* 291 F.3d at 422.

Where a trial judge has identified juror bias as the basis for a mistrial, that determination is entitled to "special respect." *Washington,* 434 U.S. at 510; *Brady,* 667 F.2d at 228. Still, the role of a reviewing court is to ensure that the judge engaged in a "scrupulous exercise of judicial discretion" in making the decision that a mistrial was necessary." *Jorn,* 400 U.S. at 485; *Brady,* 667 F.2d at 228. If the record reveals that the trial judge has failed to engage in a scrupulous exercise of discretion, there has been an abuse of the "sound discretion" entrusted to her.

The court of appeals criticized the second trial judge's decision to consider information adduced

during the hearing on the defendant's motion to dismiss based upon double jeopardy considerations. The court went on to ignore any evidence discovered after the first trial judge announced her declaration of mistrial to the parties and their counsel. *See, e.g.*, RX 312, at ¶ 40 n. 3; *Ross*, 2002 WL 31890088, at *7 n. 3 (court will not consider "information that was discovered after the mistrial was declared"). Under the facts of this case, the determination of whether manifest necessity existed required more. This is so because, even though the principles to be applied remain the same, the totality of the trial judge's conduct undermines a conclusion that the court sufficiently balanced the competing interests at stake in this case.

While the petitioner lodges several accusations concerning the trial court's motive which this court finds to be without merit, the fact remains that analysis of the mistrial decision requires more scrutiny than that given by the court of appeals. There is little question that the trial judge, confronted with a very difficult situation, attempted to sort out the dilemma presented by the content of the note received from the jury. The second trial judge conducted a hearing to consider the defendant's motion to dismiss on double jeopardy grounds. The court of appeals criticized the scope of that hearing, and determined that the second trial judge employed an incorrect legal standard. As a result, the court of appeals refused to consider any evidence developed during the hearing. Ultimately, under the totality of factors present in this case, this refusal proves unreasonable.

A. Timing of mistrial decision

The amount of time devoted to the mistrial decision is an important component of the analysis. A precipitate decision, reflected by a rapid sequence of events leading to the declaration of mistrial, indicates insufficient concern for the defendant's constitutional double jeopardy interests. *Jorn*, 400 U.S. at 487; *Brady*, 667 F.2d at 229. The state court of appeals commented: "Although the visiting judge concluded that the original trial judge had rushed to judgment without thoroughly considering the alternatives available, that conclusion was not supported by the record of what transpired on October 28, 2000." (Doc. 35, RX 312, at ¶ 40.)

Here, the evidence shows that the judge received the note from the juror sometime after the jury took their lunch break. At the evidentiary hearing, in response to a question as to whether the note had been received at approximately 2:00 p.m., the judge said that it was received "[s]ometime in mid-afternoon." (Doc. 35, RX 294, at 88, 115.) As a result of receiving the note, counsel were called into the judge's chambers, and several alternatives were discussed. *Id.* at 89-91. The court then gave counsel an opportunity to consult with their colleagues and the parties. (Doc. 35, RX 292, at 1265-1266.) The record reflects that the proceedings resumed in court at 3:40 p.m. *Id.* at 1264. After some discussion on the record, the court declared the mistrial, and court was adjourned at 4:00 p.m. *Id.* at 1279. Thus, the time that had elapsed from the receipt of the note was approximately two hours.

Relevant to the consideration of time is the manner by which the trial court handled the defendant's pending motion for mistrial, with prejudice, on the allegedly improper closing argument by the prosecution. This motion was made previous to the issue of the juror's note arising, and a decision on this pending motion could have rendered the subsequent juror misconduct issue moot. *See* doc. 40, at 30. When Ross initially asked for a ruling on his motion, the court responded that the motion was not "ripe," because the prosecutor had not had "a full or fair opportunity to respond" to the motion. (Doc. 35, RX 292, at 1267-1268.) Rather than require the prosecutor to respond orally, within the two-hour period allowed to the parties on the juror misconduct issue, the court apparently was willing to grant the prosecutor time for fuller consideration, and to delay a ruling on the defendant's motion regarding prosecutorial misconduct.

More importantly, while the original decision to defer ruling might reasonably be viewed as appropriately responsive to the gravity of the issue at stake, a short time later, and without explanation, the trial court appeared to have abandoned its decision to defer ruling in favor of declaring a mistrial, sua sponte over defendant's objection, as revealed in the following excerpt from the transcript of the proceedings conducted on October 28, 2000.

> MR. PANCER: Our next request is a mistrial with prejudice.
>
> THE COURT: And the basis for that?

MR. PANCER: The basis for that is the motions that we have previously filed in this case, the motion we have filed with this Court and all the grounds that might have given rise to a mistrial motion. Your Honor, including the question-including the information contained in the taped statement of Denny Ross.

THE COURT: And so you're essentially renewing your previous motions for this Court?

MR. PANCER: Yes, in the context of this hearing.

THE COURT: All right, sir. Motion is overruled.

(RX 292, Tr., at 1269.)

B. Defendant's Consent

The respondents claim that "Ross never once offered a contemporaneous objection to the mistrial." (Doc. 47, at 18.) The Sixth Circuit has refused to infer consent merely because a defendant did not object to the declaration of a mistrial. "Rather, a defendant's failure to object to a mistrial implies consent thereto only if the sum of the surrounding circumstances positively indicates this silence was tantamount to consent." *United States v. Gantley*, 172 F.3d 422, 429 (6th Cir.1999) (citing *Glover*, 950 F.2d at 1240).

Here, Ross made it clear that he did not consent to a mistrial without prejudice. In light of the comments made by counsel for Ross ("He does not want to have a mistrial ... on that particular ground"), and Ross himself ("I don't want a mistrial"), the court will not imply consent to the mistrial simply

because Ross failed to formally object to the court's mistrial declaration, which occurred several minutes after those comments were made. (Doc. 35, RX 292, Tr., at 1270.) However, the appellate court's decision is under review, and that decision did not turn on the issue of consent, so that issue is not properly before the court.

C. Alternatives to Mistrial

Significant as well is whether or not the record indicates that the judge considered alternatives to a mistrial. *Jorn*, 400 U.S. at 487; *Brady*, 667 F.2d at 229. The petitioner contends that the judge did not give sufficient consideration to the double jeopardy implications of a mistrial. (Doc. 1, at 61-62; doc. 40, at 50-51.) Ross emphasizes that the judge testified that she was unfamiliar with the concept that the defendant may wish to go to the jury despite "judicial or prosecutorial error prejudicing a defendant's prospects of securing acquittal." *Id.* at 50 (quoting H.Tr., at 159.) However, the record also shows that the parties discussed a number of alternatives with the judge in chambers, including, seating an alternate juror; voir dire of the jury; allowing the jury to finish deliberating; and declaring a mistrial. (Doc. 35, RX 294, at 90-91. *See also* RX 312, at ¶¶ 40-49.) The record also reflects that the court afforded counsel an opportunity to be heard on the subject. *See, e.g., Washington*, 434 U.S. at 514-515 n. 34; *Brady*, 667 F.2d at 229.

As already noted in the previous discussion on "manifest necessity," the Second Circuit in *Corey* recognized an alternative which the judge in this

case did not pursue. The *Corey* court reasoned that, once the judge became aware of a jury verdict, the court "no longer has to speculate about the possible impact of misconduct affecting the jury. The trial court can look to the verdict for an answer." *Corey*, 917 F.2d at 92. In this case, although the judge had been informed of the verdict, and the jury had not yet been actually dispersed,[8] the court decided that the verdict was a nullity.

Although the court had orally declared a mistrial, that fact was not a bar to reconsideration before judgment was entered. A recent case in the Ohio Court of Appeals is instructive in regard to the alternatives to a mistrial available under Ohio state law. In *State v. Stewart*, No.2001-P-0035, 2002 WL 31886657 (Ohio Ct.App. Dec. 27, 2002), the trial court initially declared a mistrial, after misunderstanding the jury's communication that it was deadlocked. The court had orally declared a mistrial and dismissed the jury. A few minutes after the jury had been dismissed, it was discovered that the jury in fact had reached verdicts on three charges

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[8] "Until the jury is actually discharged by separating or dispersing (not merely being declared discharged), the verdict remains subject to review." *United States v. Marinari*, 32 F.3d 1209, 1214 (7th Cir.1994).

(although it had deadlocked on the firearm specifications). The jury was called back into the courtroom, the verdicts were read and accepted, and a mistrial was declared solely on the firearm specifications. *Stewart*, 2002 WL 31886657, at *2.

The defendant appealed, arguing that the trial court violated state law by accepting the jury's (guilty) verdicts after the mistrial had been declared and the jury dismissed. The court of appeals rejected that argument. The court stated that: "The trial court's mistaken oral declaration of a mistrial did not actually result in a mistrial because a mistrial judgment was never journalized." The court relied on *Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625 (1953) (syllabus), which held that: "A court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum."

The *Stewart* court also rejected the defendant's argument that "the trial court erred by overruling her motions for a mistrial on the grounds of improper communications with jurors." The court noted controlling state and federal law:

> In *State v. Phillips* (1995), 74 Ohio St.3d 72, 656 N.E.2d 643[, *cert. denied*, 517 U.S. 1213, 116 S.Ct. 1835, 134 L.Ed.2d 938 (1996)], the Supreme Court of Ohio set forth the procedure and applicable law a court must follow when an allegation is made that an improper communication has occurred with one or more members of the jury. "When a trial court learns of an improper outside

> communication with a juror, it must hold a hearing to determine whether the communication biased the juror." (Emphasis added.) Id. at 88, 656 N.E.2d 643, 74 Ohio St.3d 72, 656 N.E.2d 643, citing *Smith v. Phillips* (1982), 455 U.S. 209, 215-216, 102 S.Ct. 940, 71 L.Ed.2d 78 ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.") and *Remmer v. United States* (1954), 347 U.S. 227, 229-230, 74 S.Ct. 450, 98 L.Ed. 654 ("The trial court should not decide and take final action ex parte * * * but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate."). See, also, *State v. Johnson* (2000), 88 Ohio St.3d 95, 107, 723 N.E.2d 1054[, *cert. denied*, 531 U.S. 889, 121 S.Ct. 212, 148 L.Ed.2d 149 (2000)].

Stewart, 2002 WL 31886657, at *4 (quoting *State v. Henderson*, No. 99-T-0001, 2000 WL 1459858 (Ohio Ct.App. Sept. 29, 2000)). The court also stated that "courts have broad discretion in determining whether to grant a mistrial or replace a juror when instances of improper communication with jurors are alleged." *Id.* (citing *Johnson*, 88 Ohio St.3d at 107, 723 N.E.2d 1054). In *Stewart*, the court found that the jurors were properly instructed, and that the communications at issue were not improper or prejudicial, thus the court was not required to hold a hearing on juror bias. *Id.* at *5.

Thus, *Stewart* indicates that the court's oral declaration of a mistrial was not, under state law, a final judgment because "[a] court of record speaks only through its journal and not by oral pronouncement." *Schenley*, 160 Ohio St. 109, 113 N.E.2d 625. The court was not precluded from further consideration of the mistrial after the jury verdicts were discovered simply because an oral declaration of mistrial had been made.

D. Analysis of Unreasonable Application of Federal Law

This court grants habeas relief under the "unreasonable application" clause only when the state court has identified the correct legal principle from Supreme Court precedent, but the state court's decision is an objectively unreasonable application of that federal law. *Williams*, 529 U.S. at 410-13. The Supreme Court has stressed that an objectively unreasonable application is different from an incorrect one. *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

In his petition, Ross does not identify the governing legal principle(s) set forth by the Supreme Court which he contends that the state court has applied unreasonably. *See* doc. 1, at 60-61; doc. 40, at 49. However, Ross argues that the state courts failed to exercise sound discretion, contrary to Supreme Court precedent. (Doc. 1, at 44-45.)

The Ohio Court of Appeals apparently considered the trial court's oral declaration of a mistrial to be final and beyond reconsideration, even after crucial relevant facts (completed verdict

forms) were discovered by the trial judge on the very afternoon of her oral ruling. The appellate court characterizes these facts as "information that was not before the trial judge at the time she made her decision." (Doc. 35, RX 312, at ¶ 13; *Ross*, 2002 WL 31890088, at *2.) However, the court acknowledged that the trial court orally declared a mistrial on October 28, 2000, but did not journalize the declaration of a mistrial until November 2, 2000. (RX 312, at ¶ 10; *Ross*, 2002 WL 31890088, at *2.)

The U.S. Supreme Court in *Arizona v. Washington* emphasized that a prosecutor has a heavy burden to demonstrate "manifest necessity," that is, a "high degree" of necessity, for the mistrial before proceeding with a second prosecution after a mistrial declared over the objection of the defendant. *Washington*, 434 U.S. at 505-506. "Manifest necessity" involves "a scrupulous exercise of judicial discretion," which recognizes "the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Jorn*, 400 U.S. at 485-486.

The Supreme Court has instructed that the court's power to declare a mistrial "ought to be used with the greatest caution, ... and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner." *Perez*, 22 U.S. (9 Wheat.) at 580. Where the trial court discovers that verdicts have been reached, the defendant's "valued right

to have his trial completed by a particular tribunal," *Washington*, 434 U.S. at 503, is even more strongly implicated. *See, e.g., Corey*, 917 F.2d 88.

A proper exercise of "sound discretion" in finding manifest necessity for a mistrial exists where the trial judge engages in "careful consideration and solicitude for the serious consequences attendant upon mistrials." *Johnson*, 198 F.3d at 596 (citing cases). In this case, the trial judge's consideration and solicitude for the serious consequences of a mistrial was ultimately unreasonable, in her balancing of the sensitive interests at stake in this capital case.

It was unreasonable for the court of appeals to assume that the trial judge was foreclosed from giving fuller consideration to her mistrial decision in light of the facts which were discovered after her ruling from the bench. The Ohio Supreme Court addressed the finality of oral rulings from the bench in *Schenley*, 160 Ohio St. 109, 113 N.E.2d 625 (syllabus), which held that: "A court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum." The Ohio Supreme Court has followed *Schenley* in a variety of circumstances over the years. *See State ex rel. Marshall v. Glavas*, 98 Ohio St.3d 297, 297-298, 784 N.E.2d 97, 98-99 (2003) (citing *Schenley*) (any oral pronouncements by judge subject to revision before journalization); *State v. Keenan*, 81 Ohio St.3d 133, 154, 689 N.E.2d 929, 948 (1998), *cert. denied*, 525 U.S. 860, 119 S.Ct. 146, 142 L.Ed.2d 119 (1998) (citing *Schenley*) (judge's

statement from bench, not incorporated into journal entry, has no force); *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80, 82-83, 523 N.E.2d 851, 854 (1988) (citing *Schenley*) ("not inconceivable" that judge in any case might change mind between time of announcing decision and filing of judgment entry). *See also State v. Vickers*, No. 01CA007928, 2002 WL 1598130, at *3 (Ohio Ct.App. July 17, 2002) (Carr, J.) ("a court speaks only through its journal entries"); *Robinson v. Clarke*, 939 F.2d 573, 577 (8th Cir.1991) (trial court's oral ruling has no final or binding effect unless formally incorporated into judgment). Here, several days elapsed between the court's oral declaration on Saturday, Oct. 28, and the journalization on Thursday, Nov. 2.

Relying on *Schenley*, for example, the court of appeals in *State v. Stewart*, found that a trial court was not precluded from further consideration of a mistrial ruling after jury verdicts were discovered, simply because an oral declaration of mistrial had been made. *Stewart*, 2002 WL 31886657. The Ohio Supreme Court declined the opportunity to review this ruling. *State v. Stewart*, 98 Ohio St.3d 1567, 787 N.E.2d 1231 (2003).

Obviously, once the trial judge had followed her declaration of mistrial from the bench with her ill-conceived solo entry into the jury room, there is no question that the jury could not continue to deliberate further. The question becomes: What was the proper course of conduct once the court discovered that the jury had reached verdicts, as it emerged, on the three most serious felony counts?

Reasonable minds could conceive of several sensible alternatives; denying any consideration whatsoever to this relevant information is not among them.

The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (citing *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954)). The Court rejected the argument that the law must impute bias to jurors, rather than confronting the allegations of bias in a hearing. *Id.* The Court has stated that a trial judge "should not decide and take final action ex parte" on allegations of bias, "but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer*, 347 U.S. at 229-230. The Court found that a post-trial hearing was sufficient to decide allegations of juror partiality. *Smith*, 455 U.S. at 217-218.

In this case, although the judge had entered the jury room to discharge the jury, they had not been dispersed. After the judge was informed of the signed verdict forms, the twelve jurors were still together in the courthouse. (Doc. 35, RX 293, at 66-68, 76.) "Until the jury is actually discharged by separating or dispersing (not merely being declared discharged), the verdict remains subject to review." *Marinari*, 32 F.3d at 1214.

The trial had lasted approximately one month

during which the defendant on multiple occasions had rejected the court's offer to begin with a new jury in response to something that was, arguably, to his potential detriment. *See, e.g.*, RX 294, at 99-101. In addition, the defendant chose to rest without putting on evidence, and further demonstrated his belief that the jury may have been disposed in his favor, by opposing the potential hazard of voir diring the jury during deliberations. Nothing on the face of the juror's note suggested any impropriety by the defense and no prejudice to the prosecution was claimed. Under the circumstances then present, it is inconceivable that the proper respect for the public interest in fair, unbiased jury trials would be undermined by a hearing on whether the verdicts should stand; rather, that public interest would be vindicated.

The trial court was presented with the opportunity to make factual findings on whether the verdicts reached were viable or tainted. Although the trial court spoke in absolutes when announcing her oral declaration of mistrial ("... there is corruption of a juror ... Court finds that this jury cannot render a fair and impartial verdict in accordance with the law"), it is clear that all the participants understood that the note merely "suggested" or was an "indication" that the jury may have been "tainted." (RX 292, Tr., at 1276.)

Once the judge learned of the signed verdict forms, a proper consideration of the defendant's double jeopardy interests mandated a reconsideration of her initial mistrial ruling. Although

the judge did not journalize her ruling until five days later, there is no indication in the record that she gave any further consideration to the additional fact of the signed verdict forms, which had been made known to her less than one hour after her ruling from the bench.

Another indication of the lack of proper concern for the double jeopardy interests at stake comes in the handling of the potential that the jury was allegedly exposed to information concerning the results of a polygraph examination of another suspect. During her colloquy with the defendant, seeking to gain his acceptance of a mistrial, the court stated that "at least one juror believes you're guilty based upon ... evidence that was not presented during trial." (RX 292, at 1270-1271.) The potential implication of how this information may have made its way into the jury room on the question of mistrial and possible retrial should have been obvious. Indeed, the defendant specifically responded to the trial court's assertion that no impropriety by either side had been alleged, by reserving its desire to have the issue explored with the jury before they were dispersed. (RX 292, Tr., at 1275.) The trial court clearly understood the potential; however, the jury was allowed to disperse without any inquiry on the issue. (RX 294, at 135, 186.)

It is well-settled that the principles which govern whether a defendant can twice be placed in jeopardy for the same offense following the sua sponte mistrial, i.e., whether manifest necessity existed, cannot be applied mechanistically, but

rather must be determined in contemplation of the particular facts facing the court in question. Here, while reasonable jurists may differ as to whether manifest necessity existed at the point of the trial judge's oral declaration of the mistrial, the Ohio Court of Appeals completely disregards the fact that the trial judge obtained relevant information at a time when she retained the ability to explore other options before finalizing such a drastic result in a capital case.

The combination of factors discussed above (VI.A.-VI.D.) does not inspire confidence that the state courts fully appreciated the double jeopardy implications of a mistrial, given the trial court's comments and conduct leading up to and following the oral mistrial declaration and their treatment by the Ohio Court of Appeals. It well may be that this conclusion could have been avoided had the trial court allowed itself and the parties more time to research the mistrial implications in light of relevant Supreme Court jurisprudence. Certainly, given all that was at stake at this critical juncture, no legitimate interest was served by failing to do so. Having allowed more time for research, it is difficult to imagine that same result would have obtained, thereafter, at least not without providing a record which could support that result, unlike the record here.

Under the totality of the circumstances of this case the court's conduct fell short of the "scrupulous exercise of judicial discretion" which the Supreme Court requires in a mistrial situation of this sort. *Jorn,*

400 U.S. at 485-486. As such, this court finds that the decision of the Ohio Court of Appeals on this issue involved an unreasonable application of clearly established Federal law.

VII. DUE PROCESS VIOLATION

Ross asserts that the court of appeals violated the Due Process Clause, by rendering an arbitrary decision, in two important respects:

> First, the appellate majority repeatedly criticized the visiting judge for conducting an evidentiary hearing, and ruled that holding the evidentiary hearing was legal error. Second, the appellate majority faulted the visiting judge for conducting a substantive review of the mistrial declared by the trial judge, claiming that the visiting judge "seemed to view his role as that of an appellate court."

(Doc. 1, at 39.) Although Ross claims that he is not relying on an error of state law, *id.* at 40 n. 17, his argument that the appellate court's legal conclusions are not supported by "a single case in Ohio jurisprudence," and his extensive citation of Ohio case law[9] would seem to compel the

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[9] Ross contends that Ohio precedent establishes that he was entitled to an evidentiary hearing, and review on the merits, of his motion. (Doc. 40, at 36.) The case law cited by Ross demonstrates, at a minimum, that a hearing before an independent judge of a motion to dismiss on grounds of double jeopardy is not extraordinary. *See, e.g., State v. Williams*, No. CA89-04-019, 1989 WL 152700, at *1 (Ohio Ct.App.

conclusion that he is, in fact, arguing that the state court erred in its application of state law. Federal habeas relief is not available for a claimed violation of state law. *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990).

In addition, Ross relies on *Rogers v. Tennessee* to argue that the state court's decision was arbitrary. *Rogers* involved the appeal of a murder conviction, in which the Tennessee Supreme Court abolished the state's common-law "year-and-a-day" rule for murder. *Rogers*, 532 U.S. at 453-455. The Supreme Court affirmed, holding that there was nothing in the Tennessee court's abolition of the rule which represented "an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." *Id.* at 467. The Court contrasted Tennessee's "routine exercise of common law decisionmaking" against an unacceptable "marked and unpredictable departure from prior precedent." *Id.*

The procedural context of *Rogers* is critical here. *Rogers* was a direct criminal appeal, which entails a distinctly less deferential standard of review than that mandated by the AEDPA in habeas cases. *Rogers* is inapposite. The court will not undertake an analysis of the correctness of the state court's application of state law precedent. The petition will not be granted on due process grounds.

Dec. 18, 1989) (per curiam); *State v. Lewis*, No. CA-7613, 1989 WL 47956, at *1 (Ohio Ct.App. Apr. 17, 1989); *State v. Aldridge*, 3 Ohio App.3d 74, 75, 443 N.E.2d 1026, 1028 (Ohio Ct.App.1981).

VIII. UNREASONABLE DETERMINATION OF THE FACTS

Ross argues that the appellate court's conclusion that the lower court sufficiently considered his double jeopardy interests before declaring a mistrial was "an unreasonable determination of the facts in light of the evidence presented at the state court [evidentiary] proceeding." Doc. 1, at 61-64 (citing *Wiggins*, 539 U.S. at 527-529).

The factual findings made by the state courts are presumed correct, and the presumption of correctness may be rebutted by the petitioner only with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). *See, e.g., Lorraine*, 291 F.3d at 422; *Warren v. Smith*, 161 F.3d 358, 360-361 (6th Cir.1998), *cert. denied*, 527 U.S. 1040, 119 S.Ct. 2403, 144 L.Ed.2d 802 (1999). Under the AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct," 28 U.S.C. § 2254(e)(1), and that presumption of correctness extends to factual findings of a state appellate court based on the state trial record. *Bowling v. Parker*, 344 F.3d 487, 497 (6th Cir.2003), *cert. denied*, 543 U.S. 842, 125 S.Ct. 281, 160 L.Ed.2d 68 (2004) (citing *Sumner v. Mata*, 449 U.S. 539, 546-47, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)). The presumption was designed to relieve federal courts of the necessity of relitigating factual issues concerning federal rights claimed by a habeas petitioner when such factual determinations have already been made by the state court at trial where the defendant had adequate opportunity to present evidence. *United*

States ex rel. Preston v. Mancusi, 422 F.2d 940, 943 (2d Cir.1970); *Maxwell v. Turner*, 411 F.2d 805, 807 (10th Cir.1969).

In *Wiggins*, the petitioner established that the lower court had based a conclusion, in part, on a clear factual error. *Wiggins*, 539 U.S. at 528-529. The lower court had found that relevant social service records included incidents of sexual abuse, when in fact "the records contain no mention of sexual abuse." The court found that the state court's assumption that the records documented evidence of abuse was shown to be incorrect by "clear and convincing evidence." *Id.*

In contrast, Ross attempts to establish that the trial court's consideration of his double jeopardy interests, when declaring a mistrial, was insufficient, and that the appellate court's finding that such consideration was sufficient was "an unreasonable determination of the facts." (Doc. 1, at 61.) Similarly, Ross urges that the court of appeals erred in concluding a juror must have disregarded the trial court's instructions. *Id.* at 62-63.

Ross raises plausible doubts regarding the state court's determinations on these issues. This court is hesitant, however, to characterize issues such as the sufficiency of the trial court's weighing of the petitioner's double jeopardy interests as "factual determinations." Assuming for the sake of argument that they are factual determinations, Ross has failed to present clear and convincing evidence to rebut the presumption of correctness.

The petition will not be granted on the ground

that the state courts made an unreasonable determination of the facts.

IX. MOTION TO PERFECT THE VERDICTS

The additional claim in the amended petition is that a second prosecution of Ross "will violate his right against double jeopardy guaranteed by the Fourteenth Amendment because the State of Ohio refuses to acknowledge that Petitioner has been lawfully acquitted." (Doc. 57, at 62.) The basis of this claim is that the trial court had denied his motion to perfect the verdicts, because the jury had been discharged prior to the verdicts being given to the court. (Doc. 35, RX 251.) Ross argues that the trial court acted contrary to clearly established federal law in denying his motion, and that there is no lawful basis for "invalidating the acquittals." (Doc. 57, at 64.)

The petitioner claims that "the absence of an entry of judgment has no effect whatsoever on the validity of an acquittal for the purposes of the Double Jeopardy Clause." (Doc. 40, at 21; doc. 57, at 65.) He cites *Green v. United States*, which stated that "a verdict of acquittal is final, ending a defendant's jeopardy, and even when not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *Green v. United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) (citing *Ball v. United States*, 163 U.S. 662, 671, 16 S.Ct. 1192, 41 L.Ed. 300 (1896)). The Court pointed out that "it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an

acquittal may appear to be erroneous." *Id.*

The respondent states that, under Ohio law, a jury has not reached a proper verdict until deliberations are over, the result is announced in open court, and no dissent by a juror is registered. (Doc. 55, at 9, citing *State v. Sneed*, 63 Ohio St.3d 3, 584 N.E.2d 1160 (1992)). Ohio Criminal Rule 31(A) provides: "The verdict shall be unanimous. It shall be in writing, signed by all jurors concurring therein, and returned by the jury to the judge in open court."

The corresponding federal rule is similar: "The jury must return its verdict to a judge in open court. The verdict must be unanimous." Fed.R.Crim.P. 31(a). The federal rule also requires a poll of the jury: "After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury." Fed.R.Crim.P. 31(d). *See, e.g., United States v. Love*, 597 F.2d 81, 85 (6th Cir.1979) (quoting *United States v. Taylor*, 507 F.2d 166, 168 (5th Cir.1975)) (jury has not reached valid verdict until deliberations are over, result announced in open court, and no dissent is registered).

A verdict is not final when it is announced; the parties must be given an opportunity to request a poll of the jury before the verdict is recorded. *Marinari*, 32 F.3d at 1212; *Love*, 597 F.2d at 84. Federal courts have held that reliance on verdict forms signed by all jurors in the jury room cannot substitute for an oral poll of the jury in open court.

Marinari 32 F.3d at 1212-1213; *United States v. Causor-Serrato*, 56 F.Supp.2d 1092, 1094 (N.D.Iowa 1999).

Ross claims to find support for his proposition that "mere procedural irregularities do not in any way undermine the enforceability of an acquittal" under the Constitution in *Green v. United States* and *Ball v. United States*. In *Ball*, the Supreme Court upheld an acquittal after a trial based on a faulty indictment which was not objected to prior to the verdict. *Ball*, 163 U.S. at 670-671. The verdict was also valid even though it was returned on a Sunday. *Id.* at 671. Unlike this case, the verdict was apparently delivered by the jury in open court. *Id.* at 664. The "mere procedural irregularities" at issue in *Ball* did not involve the finality of the verdict itself.

In *Green*, the defendant's first trial resulted in a jury finding of guilty as to charges of arson and second degree murder, but the jury verdict was silent as to the charge of first degree murder. He appealed the second degree murder conviction, which was reversed on appeal as unsupported by the evidence at trial. On remand, Green was tried again for first degree murder under the original indictment, over his objection on double jeopardy grounds. After the second trial, he was convicted of first degree murder. *Green*, 355 U.S. at 186. The Supreme Court found that the defendant's second trial for first degree murder violated the Double Jeopardy Clause. *Id.* at 190.

The *Green* Court found that "it is not even essential that a verdict of guilt or innocence be

returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge." *Id.* at 188. The Court noted that "a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again." At the same time, the Court recognized that a second trial is not barred when "unforeseen circumstances" arise during the first trial which prevent its completion. *Id.* (citing *Wade v. Hunter*, 336 U.S. 684, 688-689, 69 S.Ct. 834, 93 L.Ed. 974 (1949)). *Green* does not speak to the validity of the verdicts under the circumstances of this case.

Ross also cites *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), for the concept that "[t]he exaltation of form over substance is to be avoided," and that it is the substance of the action that is controlling, not its label. (Doc. 57, at 65, quoting *DiFrancesco*, 449 U.S. at 142.) In *DiFrancesco*, the government had appealed the length of the sentence given to the defendant. The Court found that "[t]he double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence." *Id.* at 136.

In essence, Ross argues that the verdict forms should have been recognized as valid acquittals by the state court, despite the "trivial procedural deficiency" that the purported verdicts had not been announced in open court, and the parties had not been given an opportunity to request a poll of the jury. (Doc. 57, at 65-66.) For this specific claim, he

is unable to point to any Supreme Court ruling on point, but rather resorts to cobbling together dicta from various decisions of varying relevancy. Ross has failed to demonstrate that the state court adjudication of his motion to perfect the verdicts resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. The petition will not be granted on that basis.

X. SUMMARY

The amended petition for habeas corpus (doc. 1, 57) should be granted. For the several reasons outlined above, this court finds that the decision of the Ohio Court of Appeals was contrary to, and involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d); *Williams*, 529 U.S. at 412-13. The state court's adjudication resulted in a remand for a second trial, which would violate the petitioner's protections under the Double Jeopardy Clause.

RECOMMENDATION

It is recommended that the petition be granted.

Dated: May 3, 2005 /s/ Kenneth S. McHargh

Kenneth S. McHargh

United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DENNY ROSS,	)	
	)	
Petitioner,	)	CASE NO. 5:04 CV 0849
	)	
v.	)	
	)	MEMORANDUM OPINION
JAMES PETRO, et al.,	)	AND ORDER
	)	
Respondents	)	

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I. INTRODUCTION

Before the Court is the Report and Recommendation ("R & R") of Magistrate Judge Kenneth S. McHargh that the above-captioned petition for writ of habeas corpus under 28 U.S.C. §2254 be granted. (Doc. No. 59). Pursuant to Fed.R.Civ.P. 72, both Petitioner and Respondents (hereafter referred to in the singular as "Respondent") have timely filed objections to the R

& R. (Doc. Nos. 60 and 61). Respondent has also filed a response to Petitioner's objections. (Doc. No. 62).

Having conducted the *de novo* review as to those portions of the R & R to which written objections have been made, the Court concludes that the adjudication in the State courts "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. §2254(d)(1). Accordingly, the petition for writ of habeas corpus is GRANTED.

II. FACTUAL AND PROCEDURAL BACKGROUND

No objections have been filed with respect to the recitation of the factual and procedural background set forth in the R & R. However, the Court repeats that background here in considerable detail so as to contextualize this opinion.[1]

Petitioner Ross (sometimes also referred to herein as "defendant") was arrested on May 27, 1999 in connection with the murder of Hannah Hill. On June 10, 1999, he was indicted on charges of aggravated murder, rape, kidnapping, tampering with evidence, and abuse of a corpse. The jury trial commenced on September 28, 2000 in the Summit

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[1] Some of the facts set forth here and in the R & R were gleaned from the transcript of an evidentiary hearing conducted in State court on May 22, 2001 by Judge Cirigliano who was appointed to the case after the original trial judge was disqualified. (See Doc. No. 35, Exhs. 293, 294).

County Court of Common Pleas, with Judge Jane Bond presiding. At the close of the prosecution's case, the trial judge granted a motion for acquittal on the charge of kidnapping. The defense called no witnesses and the case went to the jury on October 27, 2000.

After the lunch break on Saturday, October 28, 2000, sometime around 2:00 p.m. and while the jury was deliberating, the trial judge received a note from Juror No. 4.[2] The trial judge had a discussion with counsel, off the record, in chambers. At 3:50 p.m., she convened proceedings in court, on the record, as follows:

> THE COURT: All right. For purposes of the record, the jury is not present. Court received from the bailiff the following note from the jury as follows:
> "There is a concern about a juror. I was approached by a spokesperson for four other jurors. From comments made by this juror these four jurors feel that he is agreeing with the group to expedite this process. I was told by these jurors that they following comments were made."And that's verbatim.
> "No. 1, we need to get this done today.
> "No. 2, why are we even discussing this. He has stated all along that he believes one thing

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2 During the evidentiary hearing later conducted by Judge Cirigliano, it developed that Juror No. 4 was the jury foreperson. (Doc. No. 35, Exh. 293 at 70, 72).

but has all too quickly changed his vote to go along with the group. This morning this juror stated to me that we need to finish this today as he will be leaving after today because he has a problem at home but he did not want to put us in that position.

"To another juror he made the comment that he knows that Brad O'Born was innocent because he passed a polygraph test so Denny Ross had to be guilty.

"I have been asked if this juror can be released so that he may attend to his affairs at home and we can have an impartial and fair jury."

It's signed, "Juror No. 4."

(Doc. No. 35, Exh. 292 at 1264-65).[3] What happened immediately following is of critical importance and, therefore, the Court quotes here at great length from the trial transcript.

[THE COURT]: Court, upon receiving this [note], summonsed the prosecution and the defense. Court gave the prosecution and the defense an opportunity to consult.

It's my understanding that the prosecution has consulted with the Prosecuting Attorney, Mr. Michael Callahan; is that correct, sir?

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3 "At trial the defense identified Brad O'Born as the boyfriend of the victim and as a possible suspect in her death. No evidence was introduced at trial that O'Born had ever taken a polygraph exam."(Doc. No. 35, Exh. 229 at 2, n. 1).

MR. LoPRINZI [Assistant County Prosecuting Attorney]: That is correct, Your Honor.
THE COURT: And it's my understanding that the defense has had an opportunity to consult with the defendant, Mr. Ross; is that correct, sir?
MR. PANCER [Defense Counsel]: We have consulted with Mr. Ross, Your Honor.
THE COURT: All right. Court has reviewed the applicable law and references Ohio Revised Code 2945.36 and criteria thereunder for the discharge of a jury. Court has shared certain concerns and views with counsel. I'm going to give both the prosecution and the defense an opportunity to be heard.[4]

I also am going to inquire of both the prosecution and the defense as to whether or not pursuant to Ohio Revised Code 2945.36, subsection D, either the prosecuting attorney

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[4] Ohio Rev.Code §2945.36 provides:

The trial court may discharge a jury without prejudice to the prosecution:

(A) For the sickness or corruption of a juror or other accident or calamity;

(B) Because there is no probability of such jurors agreeing;

(C) If it appears after the jury has been sworn that one of the jurors is a witness in the case;

(D) By the consent of the prosecuting attorney and the defendant.

The reason for such discharge shall be entered on the journal.

or the defendant consent to the discharge of the jury without prejudice to the further prosecution of the case.

At this time I would inquire of the prosecution if you consent, on behalf of the prosecuting attorney, to the discharge of the jury without prejudice to the prosecution?

MR. LoPRINZI: Judge, I would consent to that, based on the information that we have about this juror and the note we received. We believe in the defendant's right to a fair trial and we would consent, Judge.

THE COURT: Counsel.

MR. PANCER: Yes, to make the record we made in chambers, Your Honor, the first request-

THE COURT: All right. First of all, have you had an opportunity to thoroughly discuss this matter with Mr. Ross?

MR. PANCER: Yes, Your Honor.

THE COURT: All right, sir. You may proceed.

MR. PANCER: Our first request is that the Court rule on the defense motion that was filed earlier today concerning the misrepresentations made during closing argument because a ruling on that motion would certainly impact our decision on this request. Given that if the jury is re-instructed as we requested, that that would be our first preference. That is our first request, Your Honor.

THE COURT: All right, sir. The Court finds that motion is not ripe, that the prosecuting

attorney has not had a full or fair opportunity to respond to the motion made by the defense. Court received a copy of that today. To my knowledge I don't-I assume that it's been served on the prosecutor since trial has not been in session.
But I know that I received no response from the prosecutor and I don't believe they've had a full and fair opportunity to so respond.
MR. PANCER: Okay. We faxed that motion to them. If they need time to respond, we wouldn't oppose that. That's our request then, that they be allowed a chance to read it and to respond. They have not been filing responses, but that's our first request.
Your Honor is still denying that request?
THE COURT: Yes, sir.
MR. PANCER: The second request is that the jury be instructed to continue to deliberate, a verdict be rendered with the defense option of a mistrial if the decision were to be unfavorable. The theory for that request is that the extra judicial evidence that exists in the jury room is not evidence that is favorable to the defense and hence we believe a verdict of not guilty would not be tainted as a-as any other verdict would be, Your Honor. That is our next request.
THE COURT: All right, sir. The motion is denied. I think that's fundamentally unfair to the State.
MR. PANCER: Our next request is a mistrial with prejudice.
THE COURT: And the basis for that?

MR. PANCER: The basis for that is the motions that we have previously filed in this case, the objections we made to various evidence at trial, the motion we have filed with this Court and all the grounds that might have given rise to a mistrial motion, Your Honor, including the question-including the information contained in the taped statement of Denny Ross.
THE COURT: And so you're essentially renewing your previous motions for this Court?
MR. PANCER: Yes, in the context of this hearing.
THE COURT: All right, sir. Motion is overruled.
MR. PANCER: Okay. I talked to Mr. Ross. He does not wish to have a mistrial in this case. I've told him the different sections of the code that allow it in terms of the one under his consent. He does not want it to be on that particular ground, Your Honor.
THE COURT: All right. Mr. Ross, you understand and you've had an opportunity to discuss this matter with your lawyers?
THE DEFENDANT: Yes, I have, Your Honor.
THE COURT: Now, the law provides that you can consent to a discharge of this jury based upon what has been presented here in open court regarding the deliberations and what the Court believes to be the misconduct and corruption of at least one of the jurors in this trial. Do you understand that you can consent to a mistrial for that basis?
THE DEFENDANT: I don't want a mistrial but I go along with whatever my attorney said.

THE COURT: Well, nobody wants a mistrial, sir. I can speak on behalf of the State, I can certainly speak on behalf of this Court. However, my concern based on this is that this evidence and these statements that have come from this jury are extremely damaging to the prospect that you could receive a fair trial, sir.

What this note is saying, Mr. Ross, is that at least one juror believes you're guilty based upon no evidence that was presented during this trial. Do you understand that?

THE DEFENDANT: I understand, Your Honor.

THE COURT: And that he's made these representations to other jurors in that jury room and that he is refusing in good faith to negotiate with other jurors; that he is refusing in good faith to continue deliberations fully and fairly; that he is indicating that he would leave at the end of today and that they must conclude this case today. This is a refusal to fulfill the obligation of a juror.

Court also is concerned that his representations regarding evidence that he apparently believes based on this, evidence that was not presented during trial.

Court notes that prior to deliberations beginning the Court made inquiry of all members of the panel whether or not there was any reason that any member of this panel could not conclude their service and render a fair and impartial decision. Court's opinion is that this juror had an absolute

obligation to speak at that time, to advise the Court that he was of the opinion, whether based on fact or surmise, that Brad O'Born was innocent because he passed a polygraph test so that Denny Ross had to be guilty.

The Court is also of the opinion that that juror had the obligation to speak if he believed that he had pressing matters at home that require his attention and prevented him from fulfilling the obligation which was placed upon him in which he freely and willingly accepted.

Court further finds that as a result of his representations to other jurors that he has impeded full and fair deliberation of the evidence in this case and that this Court is absolutely convinced that there's no way what the bell has struck I can unring.

And his representations to other jurors regarding the guilt of Mr. Ross based upon this purported polygraph test I don't believe could be purged. And I don't believe seating an alternate at this point in time could undo the damage that's been done to the deliberations in this case.

And, no, Mr. Ross, none of us wants a mistrial.

Based upon the communication from the juror, I have offered to both the prosecution and the defense the opportunity to voir dire either Juror No. 4 or to identify and voir dire the juror who purportedly has made

these statements. Do you wish that opportunity on behalf of the prosecution?
MR. GREVEN [Assistant County Prosecuting Attorney]: No, Your Honor. We are not in favor of voir dire during deliberations.
THE COURT: On behalf of the defense?
MR. PANCER: We have the same position.
THE COURT: So you are not requesting that the Court voir dire any of the jurors regarding their potential for service in this case?
MR. PANCER: Not at this time.
THE COURT: This is the time, sir. There is no other.
MR. PANCER: No, no. We're not asking the Court to voir dire the jury.
THE COURT: All right.
All right. Court, based upon its stated conclusions and based upon the face of the communication given by Juror No. 4, and since neither party wishes additional inquiry to be made by the Court in regard to a voir dire of any of the potential jurors, Court finds that the jury is unable to fulfill the obligations required by law, to fully and fairly consider the evidence and render a verdict based upon the evidence and the law in this case.

The Court finds that this situation is not the result of any action, inaction on behalf-on the part of the prosecution, nor any action or inaction on the part of the defense.

Court finds there has been no misconduct by counsel. Court finds that there has been no evidence of any misconduct or

jury tampering outside the province of the 12 jurors themselves.

If there is anyone who has any information to the contrary they must speak now.

All right. Hearing nothing this Court-

MR. CHESNOFF [Defense Counsel]: Your Honor, excuse me. We're not foreclosed from exploring this? I mean, I know you said we don't have any information now, but that is not in any way-

THE COURT: Do you want to voir dire the jury, sir?

MR. CHESNOFF: Not during their deliberations I do not. I think that would have a prejudicial impact on the deliberations.

THE COURT: I will permit inquiry of the jury after a decision has been made by the Court if the jury is discharged. Certainly that will be done. However, I want to make the record clear that I am giving the prosecution and the defense an opportunity to have this Court and to have them voir dire any individual jurors during deliberations in response to this.

MR. CHESNOFF: Thank you, Your Honor. We appreciate that. We understand the distinction.

THE COURT: And you decline that?

MR. CHESNOFF: Yes.

THE COURT: And the prosecution has declined that?

MR. GREVEN: Yes.

THE COURT: What I'm inquiring here in open

court is to whether anyone has any additional information that something has-that there's been any jury tampering, that any information regarding this issue of Brad O'Born and a polygraph has been in any way submitted to or conveyed to this juror-this jury in any way. Court has no factual basis for believing that a polygraph of Mr. O'Born was ever conducted or suggested. There was nothing in the evidence to that, to submit anything of that nature.

All right. No one having come forth, the Court has-based upon the representations made, the Court finds pursuant to Ohio Revised Code 2945.36 that there is corruption of a juror pursuant to subsection A.[5] Court finds that this jury cannot render a fair and impartial verdict in accordance with the law. The Court therefore discharges the jury without prejudice to the prosecution. A mistrial is declared.

Court will summons this panel and they will be discharged from further attendance.

I will hear further in regard to this matter on Monday morning at 9:00, require the attendance of all at that time.

I will further allow inquiry to be made of this jury once they have been discharged. That will not be record inquiry, however.

(Doc. No. 35, Exh. 292 at 1265-77) (footnotes added).

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[5]*See* n. 4, *supra*.

The trial judge adjourned the proceedings at 4:00 p.m. on October 28, 2000. However, the oral declaration of a mistrial was not journalized until November 2, 2000.

After declaring a mistrial from the bench and adjourning the proceedings, the trial judge went briefly to her chambers and then proceeded to the jury room, unaccompanied by either counsel or a court reporter. There, she told the jury what she had done. Five of the twelve jurors availed themselves of the Judge's offer to talk to her individually and privately in chambers. No contemporaneous record was made of these conversations. The remaining seven jurors waited in the jury room and all twelve were later escorted from the building around 5:30 p.m.

It was during her private conversation with the second of the five jurors, and while all the jurors were still in the courthouse, that the trial judge learned that, sometime before their lunch break *and* before the question relating to juror misconduct had been written, the jury had already signed verdicts of "not guilty" on three of the charges: aggravated murder, murder, and rape.[6] At the trial judge's direction, these verdicts were collected by the bailiff from the jury room; but the trial judge did not immediately tell the lawyers about the existence of the signed verdict forms. The trial judge did not announce the

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[6] Copies of these verdict forms, signed by all twelve jurors, are attached to an affidavit filed by defense counsel in support of the request made in State court to disqualify the trial judge. *See* Doc. No. 35, Exh. 188, Exh. C.

mistrial on the record in the presence of the jury. Nor did she assemble the jury in the courtroom and officially excuse or discharge them prior to when they were escorted from the building around 5:30 p.m. on October 28, 2000.

While the trial judge was speaking with the jurors, one of the defense counsel went to her chambers to speak with her, but was told by her bailiff that the jurors wished to talk privately with the trial judge and that counsel would have to wait. In sequence, the trial judge spoke first to the five jurors, then to a reporter from the Akron *Beacon Journal*, and then with counsel in chambers. Only then did she inform counsel that the jury had "reached verdicts, if you want to call them that." (Doc. No. 35, Exh. 188 at 10, ¶ 20). By this time, the jurors had all left the building. Hours later, defense counsel learned from a juror that three unanimous "not guilty" verdict forms had been signed by the jury. (*Id.*).

The trial judge re-commenced proceedings on Monday, October 30, 2000, and set a new trial date of January 8, 2001. Petitioner later filed a motion to bar retrial on the grounds of double jeopardy. He also moved to disqualify the trial judge on the ground that she would undoubtedly become a witness during subsequent proceedings. On January 17, 2001, the Ohio Supreme Court disqualified the trial judge and returned the matter to the administrative judge of the Common Pleas Court for reassignment. Visiting Judge Joseph Cirigliano was assigned the case.

Judge Cirigliano granted Petitioner's motion for an evidentiary hearing. That hearing was

conducted on May 22, 2001. Based on the evidence presented, the motion to bar retrial was granted by Judge Cirigliano in an opinion filed on February 15, 2002.[7] He stated:

> At the time that the trial judge declared a mistrial in this case, the judge had failed to scrupulously consider and investigate the alternatives to a mistrial. The trial judge had no first-hand knowledge on which to base its conclusion that the jury was tainted and incapable of completing its deliberations. Relying solely on the information contained in the jury foreperson's note, the trial judge possessed second and third-hand knowledge that one problem juror existed; that the juror had communicated the O'Born polygraph information to one other juror, who in turn communicated that information to the

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[7] In his opinion granting the motion to bar re-trial, Judge Cirigliano cited Supreme Court opinions as authority. He also pointed out that

> [t]he Ohio Supreme Court has applied the following criteria in determining whether a trial judge properly exercised his or her discretion in declaring a *sua sponte* mistrial: (1) did "manifest necessity" or a high degree of necessity exist for ordering a mistrial; (2) did reasonable alternatives to declaring a mistrial exist; and (3) is the public interest in fair trial designed to end in just judgments best served by ordering a mistrial?

(Doc. No. 35, Exh. 229 at 11, *citing State v. Widner*, 68 Ohio St.2d 188, 190, 429 N.E.2d 1065 (1981); *State v. Schmidt*, 65 Ohio App.2d 239, 244-45, 417 N.E.2d 1264 (1979)).

foreperson; that the same problem juror had communicated to four jurors that he had personal matters to attend to and needed to "get this [deliberation] done today;" and that the foreperson believed that the jurors could continue to deliberate as "an impartial and fair jury." The foreperson requested that the problem juror be "released." The trial court failed to make any inquiry of the jurors as to the information contained in the foreperson's note and failed to provide the jury with any curative instructions. Based on the information known to the trial judge at the time she declared a mistrial, it was not possible to know if the jury was tainted and if it was tainted, whether that taint was material and incurable. The trial judge failed to adequately consider alternatives such as dismissing the problem juror, seating an alternate, providing curative instructions, and permitting the deliberations to continue.

The trial court acted precipitately in declaring the mistrial. The issue of the problem juror arose late on a Saturday afternoon. Rather than declare a mistrial at that time, the court could have excused the jury for the night to permit the court additional time to consider the problem and possible alternatives. Instead, the court foreclosed any further exploration of the matter. The court did not discuss with counsel the procedure for an inquiry of the jury after discharge, which it had stated to counsel it would discuss with them

before the jury was discharged. The court did not summons the jurors into open court in order to discharge them. Instead, the jurors were discharged in the jury room outside the presence of counsel, courtroom personnel, or a court reporter. "A precipitate decision, reflected by a rapid sequence of events culminating in a declaration of mistrial, would tend to indicated [sic] insufficient concern for the defendant's constitutional protection." *Brady v. Samaha*, 667 F.2d 224, 229 (1st Cir.1981); cited in *United States v. Dixon*, 913 F.2d 1305, 1311 (1990).

In the present case there existed no manifest necessity for declaring a mistrial. Reasonable alternatives to a mistrial existed and the public interest in fair trials designed to end in just judgments was not met by the trial court's declaration of a mistrial. The trial court abused its discretion in declaring a mistrial because it failed to investigate the information set forth in the jury note, it failed to explore alternatives to declaring a mistrial, it failed to take into consideration the verdicts that had been reached by the jury, it failed to ascertain whether any prejudice existed as a result of the information related in the foreperson's note, it failed to attempt to cure any taint which may have existed, it acted precipitately in the declaration of a mistrial, and it failed to duly consider the defendant's right to have his trial completed by a particular tribunal, especially in light of the

fact that this is a capital case. *See United States v. Perez*, 22 U.S. (9 Wheat) 579, 580, 6 L.Ed. 165 (1824).

For the reasons stated herein, Defendant Ross' motion to bar retrial on double jeopardy grounds in granted. In view of this Court's order upholding the defendant's double jeopardy claims, this Court declines to rule on any of the other motions presently pending before this Court.

(Doc. No. 35, Exh. 229, at 14-16).

The State appealed and, in a 2-1 decision filed December 31, 2002, Judge Cirigliano's decision was reversed and remanded by a panel of the Ninth Judicial District Court of Appeals of Ohio. That court "confine[d] its review to the record of October 28, 2000" (Doc. No. 35, Exh. 241 at 8), even though it acknowledged that it was "difficult to ignore... the three 'not guilty' verdict forms[.]"(*Id.*). Applying an abuse of discretion standard to the trial judge's mistrial ruling (*see id.* at 10) and a *de novo* standard to Judge Cirigliano's decision to bar retrial on double jeopardy grounds (*see id.* at 11), the Ohio court of appeals concluded that "the visiting judge committed reversible error in finding that there was no manifest necessity for a mistrial." (*Id.*). Purposefully ignoring many of the facts that came out at the evidentiary hearing conducted by Judge Cirigliano, the court of appeals stated:

Although the visiting judge concluded that the original trial judge had rushed to judgment without thoroughly considering the

alternatives available, that conclusion was not supported by the record of what transpired on October 28, 2000. Prior to declaring a mistrial, the original trial judge asked the parties to state their positions on this issue and discussed with them each of the proposed alternatives to declaring a mistrial. FN4 The primary emphasis of Ross's arguments and the visiting judge's opinion was on information that was discovered after the mistrial was declared. This Court does not comment upon any of that information. As this Court has already emphasized, it confines its review to the record prepared at the time the decision was made.

* * * * * *

As the original trial judge explained on the record, she felt that she had no other alternative but to declare a mistrial. This Court finds no abuse of discretion in that determination. The visiting judge, based on an incorrect legal standard, erred in finding that there was no manifest necessity for a mistrial....

(Doc. No. 35, Exh. 241 at 16, 23, footnote in original). Judge P. Baird, in dissent, noted that he "agree[d] with very little, if any, of the thrust of today's majority opinion[,]" (*id.* at 26), and concluded:

...in the absence in the record of any exploration of other alternatives [,][t]he only thing the court had was the note itself, the wording of which is a slim reed upon which to base the denial to the defendant of a right

> guaranteed to him by both the Ohio and United States Constitutions. A court has no right to take away such a right unless the record amply supports the necessity for such action, and it is up to the trial court to create such a record, whether anybody asks for it or not.

(*Id.* at 27). Ross appealed to the Ohio Supreme Court, which, on May 7, 2003, declined to hear the appeal. (Doc. No. 35, Exh. 315).[8]

This petition followed on May 6, 2004,[9] challenging the ruling of the Ohio court of appeals as being both contrary to, and an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States *and* as resulting in a decision based upon an unreasonable determination of the facts in light of the evidence presented in State court. (Doc. No. 1, ¶). *See also,* 28 U.S.C. §2254(d)(1), (2).

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[8] On September 10, 2003, the trial court denied Ross's motion to perfect the three verdicts. It also denied a Rule 29 motion for acquittal and set a new trial date of November 17, 2003. On reconsideration of the Rule 29 motion, the court acquitted Ross on the charge of rape only. That has been appealed, but is not the subject of this habeas petition.

[9] The petition was automatically referred to the Magistrate Judge (Doc. No. 6). Thereafter, the Magistrate Judge dealt with close to thirty (30) motions prior to issuing his Report and Recommended Decision on May 3, 2005.

III. DISCUSSION

A. Introduction

1. Applicable Law

As ably pointed out by the Magistrate Judge, this Court's role when reviewing a petition for habeas corpus under 28 U.S.C. § 2254 is narrowly defined.

> In sum, §2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under §2254(d)(1), the writ may issue only if one of the following two conditions is satisfied- the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but

unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).[10]

The "contrary to" and "unreasonable application" clauses of §2254 have independent meaning. *Id.* at 405, 120 S.Ct. 1495.

[A] state-court decision can be "contrary to" this Court's clearly established precedent in two ways. First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours. (citation omitted).

> The word "contrary" is commonly understood to mean "diametrically different," "opposite in character or nature," or "mutually opposed." Webster's Third New International Dictionary 495 (1976). The text of §2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court.... A state-court decision will certainly be contrary

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The "new constraint(s)" referred to by the Court were enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

> to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases.... A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a federal court will be unconstrained by §2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.

Williams, 529 U.S. at 405-06, 120 S.Ct. 1495.[11]

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[11] The Supreme Court cited as an example of a decision that is "substantially different from the relevant precedent of [the] Court," the case where a state court would apply an incorrect burden of proof. The Court stated:

> ... Take, for example, our decision in *Strickland* v. *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that ... the result of the proceeding would have been different." *Id.*, at 694, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

"[A] state-court decision involves an unreasonable application of [the Supreme] Court's precedent if the state court identifies the correct governing legal rule from [the] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 407, 120 S.Ct. 1495. The Court stressed, however, that: "For purposes of today's opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of

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Williams, 529 U.S. at 405-06, 120 S.Ct. 1495. The Court also noted a similar example where, although the *result* might have been contrary to what the federal court would do, the *analysis* of the state court was not "contrary to" precedent within the meaning of §2254. The Court stated:

> Assume, for example, that a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim. Quite clearly, the state-court decision would be in accord with our decision in *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim, even assuming the federal court considering the prisoner's habeas application might reach a different result applying the *Strickland* framework itself. It is difficult, however, to describe such a run-of-the-mill state-court decision as "diametrically different" from, "opposite in character or nature" from, or "mutually opposed" to *Strickland*, our clearly established precedent. Although the state-court decision may be contrary to the federal court's conception of how *Strickland* ought to be applied in that particular case, the decision is not "mutually opposed" to *Strickland* itself.

Id. at 406, 120 S.Ct. 1495.

federal law."*Id.* at 410, 120 S.Ct. 1495 (emphases in original).[12]

2. This Court's Task

Under Fed.R.Civ.P. 72, this Court reviews *de novo* only those issues in the R & R to which written objections have been made.

In his original petition (Doc. No. 1), Petitioner raised several grounds for relief; he later added an additional ground in his amended petition (Doc. No. 57). The chart contained in Appendix A lists each ground and the Magistrate Judge's recommendation on each ground and shows which party has filed objections with respect to each recommendation.

B. De Novo Analysis of Objections to the R & R

The Court will address the Respondent's objections first, since they go to the very heart of the case. Thereafter, the Court will address the Petitioner's objections.

1. Respondent's Objections (Doc. No. 61)

Respondent's objections go directly to the

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The Court drew a further distinction. It noted that "'federal courts, even on habeas, have an independent obligation to say what the law is.' " *Williams*, 529 U.S. at 411, 120 S.Ct. 1495 (quoting *Wright v. West*, 505 U.S. 277, 305, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992)) (O'Connor, J., concurring). Therefore, a habeas court has no obligation to let stand a state court's incorrect legal determination merely because it may be reasonable.

ultimate recommendation of the Magistrate Judge, namely, that retrial of the Petitioner would violate the protections of the Double Jeopardy Clause and that the habeas corpus petition should therefore be granted. Petitioner has filed no response to these objections.

Respondent's objections generally address the recommendations regarding the following three grounds:

Ground A.iv: The Ninth Appellate District acted contrary to clearly established federal law in adjudicating Petitioner's double jeopardy claim by absolving the prosecution of its burden to demonstrate manifest necessity for a mistrial declared over the objection of the defendant.

Ground A.v: The Ninth Appellate District acted contrary to clearly established federal law by absolving the trial judge of her duty to exercise sound discretion in declaring a mistrial.

Ground C: To the extent, if any, that the Ninth Appellate District successfully articulated the correct rules of clearly established federal law regarding the double jeopardy protections of the Federal Constitution, the Ninth Appellate District's application of federal law was objectively unreasonable within the meaning of *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

Respondent also raises an issue which the Magistrate Judge did not address, although it was raised in the Return of Writ, namely that Ross has not satisfied the two requirements set forth in *Harpster v. Ohio*, 128 F.3d 322 (6th Cir.1997), *cert. denied*, 522

U.S. 1112, 118 S.Ct. 1044, 140 LED.2d 109 (1998).

a. Determination of "manifest necessity"

In Ground A.iv and Ground A.v, Petitioner asserted that the Ohio appellate court acted contrary to clearly established federal law in adjudicating Petitioner's double jeopardy claim "by absolving the prosecution of its burden to demonstrate manifest necessity for a mistrial declared over the objection of the defendant[ ]" and "by absolving the trial judge of her duty to exercise sound discretion in declaring a mistrial." The Magistrate Judge concluded that the state court of appeals "failed to require the prosecution to demonstrate how the trial judge's decision to grant the mistrial was the product of manifest necessity." (R & R at 42). *See Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 54 LED.2d 717 (1978) ("the prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant").

In addition, Petitioner asserted in Ground C that, to whatever extent the Ohio appellate court may have *articulated* the correct rules of clearly established federal law regarding double jeopardy protections, its *application* of that law was objectively unreasonable. The Magistrate Judge concluded that it was unreasonable for the Ohio court of appeals to assume that the trial judge "was foreclosed from giving fuller consideration to her mistrial decision in light of the facts which were discovered after her ruling from the bench." (R & R

at 60). In particular, the Magistrate Judge concluded that, "once the [trial] court discovered that the jury had reached verdicts, as it emerged, on the three most serious felony counts[,][reasonable minds could conceive of several sensible alternatives[,][but] denying any consideration whatsoever to this relevant information is not among [those reasonable alternatives]." (R & R at 61). The Magistrate Judge ultimately concluded that "the decision of the Ohio Court of Appeals on this issue involved an unreasonable application of clearly established Federal law." (R & R at 65).

The Respondent attacks on several fronts the recommendation of the Magistrate Judge with respect to the issue of "manifest necessity." Respondent asserts that the Magistrate Judge recommends granting the writ "largely because he would have chosen another set of alternatives than the state trial and appellate judges." (Resp. Obj. at 5). The Respondent states that this recommendation is made despite the fact that the Magistrate Judge cited the proper standard for habeas review, i.e., that "[a] state court decision is not unreasonable simply because the federal court considers the state decision to be erroneous or incorrect[.] ... [but only if the state court's decision] is an objectively unreasonable application of federal law." *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 LED.2d 389 (2000).

1) Protecting the ends of public justice

Respondent first challenges the Magistrate

Judge's reliance on *United States v. John*, 400 U.S. 470, 91 S.Ct. 547, 27 LED.2d 543 (1971), wherein a plurality of the Court held:

> ... When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial.

400 U.S. at 487, 91 S.Ct. 547. Earlier in the *John* opinion, the Supreme Court stated that the "doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." 400 U.S. at 485, 91 S.Ct. 547.

Respondent asserts that the principle underlying the *John* holding was that the trial court, in its sound discretion, must balance defendant's double jeopardy rights against defeating the ends of public justice. Respondent argues that the Magistrate Judge "calibrated his analysis almost entirely in favor of the defendant and largely sidestepped the serious ends of public justice concerns raised by this case." (Resp. Obj. at 7). Respondent argues that, "[by exercising its power to prevent the ends of public justice from being defeated, the state appeals court reasonably applied federal law [.]" (Resp. Obj. at 12).

While this Court does not quarrel with Respondent's *legal* arguments as far as they go, it concludes that the arguments conveniently ignore the *factual* scenario of *this* case and attempt to apply the law in a vacuum-which is also what the Ohio court of appeals did.

The Magistrate Judge concluded that "[under the totality of the circumstances of this case the court's conduct fell short of the 'scrupulous exercise of judicial discretion' which the Supreme Court requires in a mistrial situation of this sort." (R & R at 65, citing *John*, 400 U.S. at 485, 91 S.Ct. 547). In the Magistrate Judge's view, a very important component of that "totality of the circumstances" as the discovery of three signed verdict forms after an oral declaration of mistrial. The R & R states: "Once the judge learned of the signed verdict forms, a proper consideration of the defendant's double jeopardy interests mandated a reconsideration of her initial mistrial ruling." (R & R at 63).

Although not completely disregarding the discovery of the verdict forms, as did the Ohio court of appeals, this Court would not place on that discovery quite the same emphasis as did the Magistrate Judge. In the Court's view, even if the verdicts had never been discovered, even if the verdicts did not exist, the record would still reveal the trial judge's utter failure to exercise the required "scrupulous ... judicial discretion" in the face of the jury foreperson's question prior to the oral mistrial declaration.

As properly noted by Judge Cirigliano following the evidentiary hearing:

At the time that the trial judge declared a mistrial in this case, the judge had failed to scrupulously consider and investigate the alternatives to a mistrial. The trial judge *had no first-hand knowledge* on which to base its conclusion that the jury was tainted and incapable of completing its deliberations. Relying solely on the information contained in the jury foreperson's note, the trial judge *possessed second and third-hand knowledge* that one problem juror existed; that the juror had communicated the O'Born polygraph information to one other juror, who in turn communicated that information to the foreperson; that the same problem juror had communicated to four jurors that he had personal matters to attend to and needed to "get this [deliberation] done today;" and that the foreperson believed that the jurors could continue to deliberate as "an impartial and fair jury." The foreperson requested that the problem juror be "released." The trial court *failed to make any inquiry of the jurors as to the information contained in the foreperson's note and failed to provide the jury with any curative instructions.* Based on the information known to the trial judge at the time she declared a mistrial, *it was not possible to know if the jury was tainted and if it was tainted, whether that taint was material and incurable. The trial judge failed to adequately consider alternatives such as dismissing the problem juror, seating an alternate, providing*

curative instructions, and permitting the deliberations to continue.

(Doc. No. 35, Exh. 229 at 14, underlining added).

These are the *facts*, properly found by Judge Cirigliano in his role as post-mistrial fact-finder. No one could seriously challenge these facts. Yet the Ohio court of appeals simply declared, without any citation to the record, that "[prior to declaring a mistrial, the original trial judge asked the parties to state their positions on the issue and discussed with them each of the proposed alternatives to declaring a mistrial." (Doc. No. 35, Exh. 241 at 16). This is absolutely not the case, as is shown by the very lengthy quotation from the record in Section II, *supra*.

It is quite clear from the record of the trial *at the time of the mistrial decision* (the time period focused on by the Ohio court of appeals) that the trial judge had made no effort to ascertain the truth of what was contained in the foreperson's note. The Ohio court of appeals discounted that fact by declaring that notes from the jury are taken at face value. That might be true to a point, but not when the note is going to be used as the basis for a mistrial over the defendant's objection in a capital murder case.

Further, even *assuming* the truth of the information contained in the note, the trial judge made no effort to determine whether that extra-judicial information had indeed resulted in "corruption of a juror," Ohio Rev.Code §2945.36(A), which would justify discharge of the jury under Ohio

law. The trial judge had informal discussions with counsel in chambers, but she never inquired of the jurors themselves. At the evidentiary hearing, she said that she did not *voir dire* the jury because neither counsel wanted her to do so; however, as the presiding judge, she had a duty to make proper inquiry.

The Ohio court of appeals criticized Judge Cirigliano for a "hindsight analysis of the thought processes of the trial judge and *information that was not before the trial judge* at the time she made her decision[ ]" (Doc. No. 35, Exh. 241 at 5, underlining added),[13] ignoring the fact that the information was not before the trial judge only because she herself failed to seek the information in a timely fashion. The Ohio court of appeals concluded, in the face of all the facts set forth by Judge Cirigliano but rejected by the court as hindsight analysis, that the trial judge had properly exercised her discretion in declaring manifest necessity for a mistrial. This is clearly both an unreasonable application of the law and an unreasonable determination of the facts. There is no way that any reasonable person would conclude that the trial judge had employed a "scrupulous" exercise of judicial discretion to determine that a mistrial was a "manifest necessity."

The mere fact that the jury foreperson wrote a

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The Ohio court of appeals furthered criticized Judge Cirigliano for "viewing] his role as that of an appellate judge[.]" and stated that his only role "was to determine whether there had been a manifest necessity to declare a mistrial[.]"(*Id.*, n. 5). Of course, that is precisely what Judge Cirigliano had done.

note containing certain statements or allegations does not render a mistrial "manifest."[14] The trial judge has a duty to explore the truth of the information in the note and the impact, if any, of that information on a jury's ability to deliberate. That simply did not happen here.

Furthermore, although this Court does not find discovery of the three verdict forms dispositive, it does at least recognize that such discovery changed the circumstances faced by the trial judge and should not have been ignored.[15]Here, the trial judge made no effort to evaluate the potential validity of those verdicts by inquiring of the individual jurors on the record whether those verdicts might have been tainted by either the one juror's knowledge of a lie detector test and/or that same juror's desire to complete deliberations that day; she never revealed to the parties and counsel even the existence of verdicts prior to the jury's release (which she never did formally in open court).

This Court concludes that the State court of appeals, in deciding that Petitioner can be retried without violating the Double Jeopardy Clause of the

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When something is "manifest" it is "clearly revealed to the eye, mind, or judgment; open to view or comprehension; obvious." Oxford English Dictionary .

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As pointed out by the Magistrate Judge: "Reasonable minds could conceive of several sensible alternatives; *denying any consideration whatsoever to this relevant information is not among them.*" (R & R at 61, emphasis added).

Fifth Amendment, rendered a decision that "involved an unreasonable application of[ ] clearly established federal law," 28 U.S.C. §2254(d)(1), which requires a showing of "manifest necessity" before declaring a mistrial over a defendant's objection. Here, there was no such showing.

2) Improper application of State law

The Respondent also argues that the Magistrate Judge improperly hinged his recommendation that federal law was unreasonably applied upon an incorrect reading of State law as it relates to the finality and/or journalization of verdicts. The Magistrate Judge concluded that the oral mistrial order was not a bar to reconsideration, once the signed verdicts were discovered, because the oral order had not yet been journalized and " '[a] court of record speaks only through its journal and not by oral pronouncement.' " (R & R at 55, 57). Respondent argues that the Ohio court of appeals recognized and upheld as final the oral declaration of a mistrial. Respondent states that it has reviewed all of the cases cited by the Magistrate Judge and none stands for the "erroneous conclusion that a declaration of mistrial does not actually occur with a judge's oral pronouncement-despite the conclusion of a trial and the discharge of a jury from its service and oath-until a judge files a journal

entry." (Resp. Obj. at 20).[16]

For one simple reason, this Court need not decide whether, under Ohio law, journalization is required to make a ruling final-even if the oral mistrial declaration from the bench was final, it still violated clearly established federal law because it simply was not the product of the "scrupulous exercise of judicial discretion" upon a showing by the prosecution of "manifest necessity" for a mistrial over defendant's objection.

3) Appeals Court decision deemed erroneous and incorrect

The Respondent argues that the Magistrate Judge improperly determined that the writ should be granted because the Ohio appeals court decision is incorrect. This argument has no merit in light of the discussion above and the objection is overruled.

4) Conclusion re: Manifest Necessity

The Court overrules Respondent's objections and adopts the Magistrate Judge's conclusion that Ohio courts fell short of the "scrupulous exercise of

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The Respondent improperly characterizes the facts of the case when it argues that the trial judge made an oral declaration of mistrial *and* concluded the trial and dismissed the jury. That is not what happened. No one can honestly say that the trial judge ever properly discharged the jury.

judicial discretion" which the Supreme Court requires in a mistrial situation of this sort and, therefore, resulted in a decision that was an unreasonable application of clearly established federal law.

b. The Harpster exception

Respondent argues that the Magistrate Judge failed to address its argument in the Return of Writ (Doc. No. 33) that the narrow circumstances under which a federal court may interfere with a state court proceeding have not been met in this case. Respondent points to *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir.1997), *cert. denied*, 522 U.S. 1112, 118 S.Ct. 1044, 140 L.Ed.2d 109 (1998). *See* Doc. No. 33 at 17-18; Resp. Obj. at 28-30. Although the Magistrate Judge cited to *Harpster* several times in his R & R, it does appear that he has not addressed this issue directly.

The Court is not entirely sure that it understands Respondent's *Harpster* argument. In the Return of Writ, the Respondent purports to quote from *Harpster* as follows:

> As this court has explained, the federal adjudication of double jeopardy claims raised on pre-trial petitions for habeas corpus is appropriate when those claims have been raised and rejected in the state trial court and under state law there is no right to interlocutory appeal. *See Gully v. Kunzman*, 592 F.2d 283, 287 (6th Cir.1979), *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292, *reh'g*

denied, 444 U.S. 889, 100 S.Ct. 192, 62 L.Ed.2d 125. **Ross** satisfies these requirements. First, the trial court considered and rejected **Rosss** [sic] pre-trial motion to dismiss the second trial based on a violation of the Double Jeopardy Clause. Second, under Ohio law, "the overruling of a motion to dismiss on the ground of double jeopardy is not a final appealable order." *State v. Crago*, 53 Ohio St.3d 243, 244, 559 N.E.2d 1353 (1990). Under these circumstances federal adjudication was necessary to protect **Ross'** rights under the Double Jeopardy Clause.

Return of Writ, at 17-18 (bolding added) (purporting to quote from *Harpster*, 128 F.3d at 325-26). The original *Harpster* opinion, of course, did *not* have any references to Ross! All of the uses of "Ross" in the above quotation are completely fabricated. The original *Harpster* decision refers to "petitioner" in each instance where "Ross" is used above. In the Respondent's objections to the R & R, the same passage above is quoted, but correctly-using "petitioner" and not "Ross." As already noted, the Court has no idea what the Respondent is really attempting to argue here. It is not surprising that the Magistrate Judge ignored this contradictory offering of the Respondent.

The clearest expression of Respondent's argument on this point is that Petitioner cannot bring this habeas petition because he "has already received state appellate review of his double jeopardy claim." This Court reads *Harpster* as stating just the opposite, namely, that precisely because his

double jeopardy claim has already been rejected by the State courts, "federal adjudication [is] necessary to protect petitioner's rights under the Double Jeopardy Clause." *Harpster*, 128 F.3d at 326. *Harpster* stands in part for the unremarkable proposition that a federal court cannot review double jeopardy claims that have not first been presented to the state court. This is a standard exhaustion requirement for all habeas petitions. In fact, in making this legal point, the Harpster court cites to *Gully v. Kunzman*, 592 F.2d 283, 287 (6th Cir.1979), *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292; *reh'g denied*, 444 U.S. 889, 100 S.Ct. 192, 62 L.Ed.2d 125 (1979), which states: "Of course, a federal court should not entertain double jeopardy claims on pre-trial habeas corpus unless the defendant has exhausted whatever procedures are available to him under state law for 'pre-exposure' vindication of his rights."

Upon *de novo* review of Respondent's *Harpster* argument, this Court finds no merit in any objection based on *Harpster* and therefore overrules any such objection.

2. Petitioner's Objections (Doc. No. 60)

Of course, Petitioner has no objection to the overall recommendation that habeas relief be granted on double jeopardy grounds. Petitioner's objections are all aimed at preserving his legal arguments for purposes of appeal. Respondent has filed a brief responding to Petitioner's objections. (Doc. No. 62). The following is the Court's *de novo* review on these matters.

a. Prosecution following acquittal

Ground A.i: The Ninth Appellate District acted contrary to clearly established federal law by holding that Petitioner could be prosecuted a second time following an acquittal; and

Supplemental Ground: Re-prosecution of Petitioner will violate his rights against double jeopardy guaranteed by the Fourteenth Amendment because Ohio refuses to acknowledge that Petitioner has been lawfully acquitted.

Petitioner objects to the Magistrate Judge's conclusion that the Ohio court of appeals did not hold that he could be re-prosecuted following an acquittal. This objection must be considered along with another objection, namely, Petitioner's objection to the Magistrate Judge's conclusion with respect to his supplemental ground relating to the Ohio court's "refus[al] to acknowledge that [he] has been lawfully acquitted." (R & R at 26-27, 69-73; Pet. Obj. at 2-3). Upon *de novo* review, this Court cannot fault the reasoning of the R & R with respect to these two grounds. Accordingly, these two objections are overruled and the Court adopts the Magistrate Judge's recommendations on these two grounds. *See* R & R at 26-27; 69-73.

b. Arbitrary decision in violation of Rogers v. Tennessee, 532 U.S. 451 (2001)

Ground A.ii: The Ninth Appellate District acted contrary to clearly established federal law by rendering an arbitrary decision in violation of *Rogers*

v. *Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001).

Petitioner objects to the Magistrate Judge's conclusion that his claim under *Rogers* v. *Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001) is no more than a claimed violation of state law and, as such, is not cognizable under habeas review and that, in any event, *Rogers* is inapposite because it involved a direct appeal. (R & R at 65-67; Pet. Obj. at 6-8).

Applying *Rogers* to this case would be a stretch.[17] Petitioner advances *Rogers* as support for his claim that "refusal of the Ohio Court of Appeals

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The Supreme Court described the *Rogers* case as follows: This case concerns the constitutionality of the retroactive application of a judicial decision abolishing the common law 'year and a day rule.' At common law, the year and a day rule provided that no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of the act. *See, e.g., Louisville, E. & St. L.R. Co. v. Clarke*, 152 U.S. 230, 239, 14 S.Ct. 579, 38 L.Ed. 422 (1894); 4 W. Blackstone, Commentaries on the Laws of England 197-198 (1769). The Supreme Court of Tennessee abolished the rule as it had existed at common law in Tennessee and applied its decision to petitioner to uphold his conviction. The question before us is whether, in doing so, the court denied petitioner due process of law in violation of the Fourteenth Amendment. *Rogers*, 532 U.S. at 453, 121 S.Ct. 1693. Rogers had been convicted of the murder of a victim who died 15 months after he had been stabbed. Although Rogers was claiming a due process violation, the underlying issue was one of retroactive application of new case law to his circumstances. As already noted, it is simply too much of a stretch to apply *Rogers* here.

to consider the evidence adduced at Petitioner's evidentiary hearing constituted a blatantly arbitrary decision in light of Ohio precedent." (Pet. Obj. at 6). In a way, he is attempting to argue "surprise" and that Ohio precedent clearly allowed him an evidentiary hearing. Upon *de novo* review, this Court agrees that this ground raises only state law arguments and is not cognizable in habeas corpus. This objection is overruled and the Court adopts the R & R with respect to this ground. *See* R & R at 65-67.

c. No right to an evidentiary hearing

Ground A.iii: The Ninth Appellate District acted contrary to clearly established federal law by holding that Petitioner did not have a right under the Federal Constitution to a pretrial evidentiary hearing in support of his double jeopardy claim.

Petitioner objects to the Magistrate Judge's conclusion that the Ohio court of appeals did not hold that Petitioner was not entitled to an evidentiary hearing in support of his double jeopardy claim, but only that it had limited its evaluation of the mistrial decision to matters that were on the record at the time the decision was made. (R & R at 27; Pet. Obj. at 3-4).

The Court finds some merit in Petitioner's argument that, by refusing to consider matters which only came to light by way of the evidentiary hearing conducted by Judge Cirigliano (e.g., the existence of signed verdict forms), he was placed, on appeal, in the same position as if he had never even had an evidentiary hearing. Of course, the Ohio Supreme

Court would never have disqualified the trial judge on the ground that there was a "significant likelihood that [she] will be called to testify in subsequent proceedings about her actions in this case after she learned of possible juror misconduct[ ]" (Doc. No. 35, Exh. 189) if, in fact, it believed that an evidentiary hearing would be impermissible. Therefore, this Court does find it odd that the Ohio court of appeals refused to consider some of the testimony given at that evidentiary hearing on the ground that it was "nearly seven months after the [mistrial] decision was made." (Doc. No. 35, Exh. 312). Although the hearing may have been conducted seven months later, the testimony at the hearing related to the events which occurred at the time of the mistrial decision.

Evidentiary rulings are generally not the subject of habeas review unless they implicate a constitutional right. *See Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir.1994). In this case, the Court finds Petitioner's objection well-taken and therefore sustains the objection insofar as this Court rules that the Ohio court's refusal to consider some of the evidentiary material before it actually affected Petitioner's ability to make his double jeopardy argument before that court and had the *effect* of denying him a hearing.

d. Forcing a choice between constitutional rights

Ground A.vi: The Ninth Appellate District acted contrary to clearly established federal law in holding that the trial court could force Petitioner to choose between his double jeopardy rights and his

impartial jury rights, when permitting Petitioner to exercise both his double jeopardy and impartial jury rights would not have placed any cognizable hardship on the prosecution.

Petitioner objects to the Magistrate Judge's conclusion that the ruling of the state court of appeals was not contrary to the holding of *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). (R & R at 47-49; Pet. Obj. at 4-6). Petitioner has argued that, when both the trial court and the court of appeals rejected his suggestion that he be allowed to reserve the option to move for a mistrial until after a verdict was rendered (a motion which would have been made if guilty verdicts were returned), he was forced to choose between his right to have his case decided by the jury that had already been seated and his right not to be put in jeopardy twice. Before the Ohio courts and this Court, Petitioner asserts that *Dinitz* stands for the proposition that, when a defendant's case has been prejudiced, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *Dinitz*, 424 U.S. at 609, 96 S.Ct. 1075.

The R & R concluded that *Dinitz* was inapposite because it involved a retrial following a mistrial declared on defendant's motion. Although pointing out the "Hobson's choice" recognized by the *Dinitz* Court, the R & R concludes that *Dinitz* "did not hold that a defendant could request that the jury continue to a verdict in the manner requested

by Ross, that is, reserving the option for a mistrial dependent on the outcome of the jury deliberations." (R & R at 49).

This Court agrees with the Magistrate Judge's reading of *Dinitz* and with the Ohio court's conclusion, based on *Dinitz*, that "allowing the jury to determine a defendant's fate means that the defendant agrees to take his chances and is willing to accept the jury's verdict, be it guilty or not guilty." *State v. Ross*, 2002 WL 31890088, at *8.[18] *Dinitz* quite clearly identified the two choices faced by a defendant: (1) "giving up his first jury" or (2) "continuing a [tainted] trial[.]" *Dinitz*, 424 U.S. at 609, 96 S.Ct. 1075. As properly pointed out by the Ohio court of appeals, Ross's suggestion of proceeding to a verdict and then, if the verdict was "guilty," allowing him to move for a mistrial, amounted to declining "a willingness to take his chances with the first jury, for he was only willing to accept a verdict of not guilty." *Id.* This is correct. Ross wanted *not* to make his Hobson's choice. The mere fact that it was a difficult choice does not mean, as Ross now argues, that he could not "retain primary control over the course to be followed[.]" *Dinitz*, 424 U.S. at 609, 96 S.Ct. 1075.

Upon *de novo* review, the Court adopts the Magistrate Judge's conclusion that the Ohio court of

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[18] A copy of original decision of the Ninth Judicial District Court of Appeals of Ohio can be found at Doc. No. 35, Exh. 241. Hereafter, any citations to this opinion will be to Doc. No. 35, Exh. 241.

appeals did not act contrary to clearly established federal law with respect to this issue. (R & R at 49).

e. Unreasonable determination of the facts

Ground D.i: The conclusion of the Ninth Appellate District that the trial judge considered Petitioner's double jeopardy interest prior to declaring a mistrial was an unreasonable determination of the facts in light of the evidence presented at the state court proceeding within the meaning of § 2254(d)(2) and *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). AND

Ground D.ii: The conclusion of the Ninth Appellate District that a juror at Petitioner's trial had refused to follow the court's instructions was an unreasonable determination of the facts in light of the evidence presented at the state court proceeding within the meaning of § 2254(d)(2) and *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Petitioner half-heartedly objects to the Magistrate Judge's conclusion with respect to these two grounds that he has not met his burden of presenting clear and convincing evidence to rebut the presumption of correctness with respect to state court findings of fact relating to these grounds. (R & R at 67-69; Pet. Obj. at 9-10). Although Petitioner declares the fact of his objection, he makes no further argument. Accordingly, these "objections" are overruled.

Petitioner argues, in addition, that the Magistrate Judge erred in characterizing his

concern about the trial court's consideration of his double jeopardy interests as a concern over the *sufficiency* of consideration. Petitioner argues in his objection that he believes the trial court gave *no* consideration to his right to take his case to the first jury. He cites *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). He points to a single statement of the trial judge during the post-mistrial evidentiary hearing which he believes suggests that she did not even know that he had a right to take his case to his first jury. As a result, he argues that it was unreasonable for the Ohio court of appeals to make what he characterizes as a *factual* determination that a thorough inquiry had been made into reasonable alternatives to declaring a mistrial. (Pet. Obj. at 10).

This Court finds no merit in this objection, in view of the heavy burden that Petitioner bears when attempting to challenge factual determinations of a state court in the habeas context. Petitioner has not met that burden. The objection is overruled.

IV. CONCLUSION

Having conducted a *de novo* review on the matters raised by the parties in their objections to the Magistrate Judge's Report and Recommended Decision, the Court concludes that the adjudication in the State courts "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1).

This Court is mindful of the gravity of this conclusion since it means that the State of Ohio cannot re-try Petitioner on the very serious charges brought against him. Nonetheless, if a civil right such as that embodied in the Fifth Amendment prohibition against double jeopardy is to have any meaning at all, this Court cannot simply look the other way when a State court decision violates this prohibition. As distasteful as it may be that serious charges escape adjudication by the grant of this writ, bending the Constitution is not the solution. Rather, the solution lies in what the Supreme Court has identified as "a scrupulous exercise of judicial discretion" prior to reaching a decision that "the ends of public justice would not be served by a continuation of the proceedings." *United States v. Jorn*, 400 U.S. 470, 486, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).

For the reasons set forth above, the petition for writ of habeas corpus is GRANTED.

IT IS SO ORDERED.

Nos. 05-4212, 05-4213

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNY ROSS, Petitioner-Appellee/ Cross-Appellant, v. JAMES PETRO, Attorney General for the State of Ohio, Respondent, and SUMMIT COUNTY COURT OF COMMON PLEAS, Respondent-Appellant/ Cross-Appellee	) OPINION

BEFORE: GUY, ROGERS and McKeague, Circuit Judges

McKEAGUE, Circuit Judge.

Following four weeks of trial on murder, kidnaping, rape and other charges, and during the second day of jury deliberations, the Ohio trial court declared a mistrial after receiving a note from the foreperson indicating the jury's deliberations had been tainted by extraneous information. Prior to

commencement of the second trial, however, the trial court, in the person of a replacement visiting judge, granted defendant Denny Ross's motion to bar reprosecution on double jeopardy grounds, concluding there was no "manifest necessity" for mistrial. This ruling was reversed by the Ohio Court of Appeals and the Ohio Supreme Court denied leave to appeal. Defendant thereupon sought pretrial habeas relief in federal court, which was granted. The district court held that the Ohio Court of Appeals' ruling represents an unreasonable application of clearly established federal law. On appeal, the Summit County Court of Common Pleas contends the district court failed to abide by the deferential standard of review made applicable by the Anti-Terrorism and Effective Death Penalty Act. For the reasons that follow, we agree. The district court's judgment granting the writ of habeas corpus will therefore be reversed.

I. BACKGROUND

The material facts are not disputed. In connection with the murder of 18 year-old Hannah Hill, defendant Denny Ross was charged in Summit County Court of Common Pleas with murder, aggravated murder, rape, kidnaping, tampering with evidence, and abuse of a corpse. Trial commenced on September 28, 2000. At the close of the prosecution's case, the trial court, Judge Jane Bond, granted defendant's motion for judgment of acquittal on the kidnaping charge. The defense presented no proofs and the jury began deliberating on October 27, 2000. Early in the afternoon of Saturday, October 28, the jury having resumed its

deliberations after its lunch break, Judge Bond received a note from the foreperson. After advising counsel for the parties and giving both sides an opportunity to consider the note's ramifications, Judge Bond convened a hearing at 3:50 p.m. and read the contents of the note into the record:

> THE COURT: All right. For purposes of the record, the jury is not present. Court received from the bailiff the following note from the jury as follows:
>
> "There is concern about a juror. I was approached by a spokesperson for four other jurors. From comments made by this juror these four jurors feel that he is agreeing with the group to expedite this process. I was told by these jurors that they [sic] following comments were made." And that's verbatim.
>
> "No. 1, we need to get this done today.
>
> "No. 2, why are we even discussing this. He has stated all along that he believes one thing but has all too quickly changed his vote to go along with the group. This morning this juror stated to me that we need to finish this today as he will be leaving after today because he has a problem at home but he did not want to put us in that position.
>
> "To another juror he made the comment that he knows that Brad O'Born was innocent because he passed a polygraph test so Denny Ross had to be guilty.
>
> "I have been asked if this juror can be

released so that he may attend to his affairs at home and we can have an impartial and fair jury."
It's signed, "Juror No. 4."

Trial tr. pp. 1264-65, JA 43-44.[1] Judge Bond then, with reference to Ohio Rev.Code § 2945.36, gave the prosecutor and defense counsel opportunity to comment on whether either consented to discharge of the jury without prejudice to the prosecution.[2]

The prosecutor consented, but defendant did not. Observing that the extraneous information that had come to light was not favorable to the defense, defendant requested essentially that the jury be

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1 Brad O'Born apparently was the boyfriend of the victim and was a suspect in the investigation of her death. No evidence was introduced at trial that O'Born had ever been subject to polygraph examination. However, Judge Bond recalled that this information had been the subject of pretrial publicity in the Akron Beacon Journal newspaper. Hrg. tr. p. 160-61, JA 266-67.

2 Ohio Rev.Code § 2945.36 provides:
The trial court may discharge a jury without prejudice to the prosecution:
(A) For the sickness or corruption of a juror or other accident or calamity;
(B) Because there is no probability of such jurors agreeing;
(C) If it appears after the jury has been sworn that one of the jurors is a witness in the case;
(D) By consent of the prosecuting attorney and the defendant.
The reason for such discharge shall be entered on the journal.

instructed to continue deliberating and that a mistrial be declared, at defendant's option, only if an adverse verdict (evidencing the possible influence of the extraneous information) were returned. Alternatively, defendant moved for a mistrial with prejudice. The trial court denied both requests.

The court went on to repeatedly invite a request from either side to conduct a *voir dire* examination of any of the jurors. Neither the prosecution nor the defense wished to interfere with the pending deliberations. In fact, Judge Bond later characterized defendant's counsel's objection to *voir dire* as "vociferous" and "adamant." Hrg. tr. pp. 143-44, JA 249-50. Judge Bond proceeded to explain her belief that the jury note was "extremely damaging to the prospect that you [defendant] could receive a fair trial" inasmuch as it indicated "that at least one juror believes you're guilty based upon no evidence that was presented during this trial." Trial tr. p. 1271, JA 50.[3] Judge Bond believed

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[3] Judge Bond's construction of the note as signaling a development adverse to defendant's interests is incomplete. The note can also be read as implying that at least a majority of the jurors were inclined to find defendant not guilty and that a "hold-out juror," whose contrary view was impermissibly based at least in part on extraneous information, had decided to "give in" in order to facilitate the reaching of a unanimous verdict by the end of the day. Standing alone, the supposed polygraph test results did not, of course, work in defendant's favor. But the context in which the information arose suggested that, to the extent the information had been shared, it had not swayed other jurors; and, in fact, the disseminator of the

that the problem juror had engaged in misconduct, and that his misconduct had "impeded full and fair deliberation of the evidence" by other jurors. *Id.* at 1272, JA 51. Judge Bond was "absolutely convinced" there was no way to "unring" the bell that had been rung. *Id.* She considered but rejected the notion of seating an alternate juror in place of the problem juror. Judge Bond therefore found there to be "corruption of a juror" pursuant to Ohio Rev. Code § 2945.36(A), and determined that the jury could not render a fair and impartial verdict in accordance with the law. On the record, she declared a mistrial without prejudice to the prosecution and discharged the jury.

Then, Judge Bond, alone, met with the jury in the jury room. She explained to the jurors what she had done, learned that some of the jurors were "extremely upset," and invited any who had concerns to speak with her privately in her chambers. Hrg. tr. p. 104, JA 210. Five jurors spoke individually with Judge Bond. During one of these conversations, she learned for the first time that the jury had completed and signed verdict forms unanimously finding defendant not guilty of the charged offenses of murder, aggravated murder and rape (though the jury had not yet reached a decision on the remaining two charges, tampering with evidence and abuse of a corpse). Judge Bond

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information had even decided to abandon his reliance on it in casting his own vote. In sum, then, the note appeared to be good news to defendant.

instructed her bailiff to retrieve the verdict forms from the jury room. She then released the jurors without making further inquiry about the juror misconduct and without giving counsel a chance to speak with them. Only after the jurors had left the building did Judge Bond advise counsel of the signed verdict forms.

A new trial was set to commence on January 8, 2001. Defendant moved the court to bar retrial on double jeopardy grounds. He also moved to disqualify Judge Bond from hearing the motion, as she would likely be called as a witness. The motion to disqualify was granted and Visiting Judge Joseph Cirigliano was assigned to the case. He conducted an evidentiary hearing on the motion to bar retrial on May 22, 2001. Judge Cirigliano granted the motion to bar retrial in an opinion issued February 15, 2002. He summarized the rationale for his decision as follows:

> In the present case there existed no manifest necessity for declaring a mistrial. Reasonable alternatives to a mistrial existed and the public interest in fair trials designed to end in just judgments was not met by the trial court's declaration of a mistrial. The trial court abused its discretion in declaring a mistrial because it failed to investigate the information set forth in the jury note, it failed to explore alternatives to declaring a mistrial, it failed to take into consideration the verdicts that had been reached by the jury, it failed to ascertain whether any prejudice existed as a result of the information related in the foreperson's

> note, it failed to attempt to cure any taint which may have existed, it acted precipitately in the declaration of a mistrial, and it failed to duly consider the defendant's right to have his trial completed by a particular tribunal, especially in light of the fact that this is a capital case.

Opinion pp. 15-16, JA 341-42.

The State of Ohio appealed this ruling. In a 2-1 decision filed on December 31, 2002, 2002 WL 31890088, the Ninth Judicial District Court of Appeals reversed. The court of appeals determined that Judge Cirigliano erred by failing to confine his scrutiny of the record to the facts known to Judge Bond at the time she declared a mistrial and by applying an erroneous legal standard, which constituted an abuse of discretion. The court of appeals explained that "manifest necessity" does not mean "absolute necessity."Decision pp. 11-12, JA 353-54. The court concluded that Judge Bond had exercised "sound discretion" in that she "allowed the parties to state their positions, considered their competing interests, and made a thorough inquiry into reasonable alternatives prior to declaring a mistrial in this case." *Id.* at 13, JA 355. The court held that Judge Bond was entitled to take the note at face value and was therefore justified in her conclusion that the jury had been tainted by juror misconduct in a way that could not be purged. *Id.* The court held that Judge Cirigliano failed to give proper weight to "the public's interest in fair trials designed to end in just judgments." *Id.* at 14-15, JA 356-57. Judge Bond was held not to have abused

her discretion by failing to consider alternatives not proposed by the parties or by failing to conduct *voir dire* examination of any jurors over the parties' objection.

After the Ohio Supreme Court declined to hear defendant Ross's appeal from the court of appeals' ruling, he filed his habeas petition in the Northern District of Ohio on May 6, 2004. The petition was first evaluated by Magistrate Judge Kenneth S. McHargh, who issued a 74-page report and recommendation on May 3, 2005, recommending that the petition be granted. On August 22, 2005, 382 F.Supp.2d 967, District Judge David D. Dowd, Jr., issued his own 36-page opinion and order overruling objections to the report and recommendation and granting habeas relief. Applying the standard of review prescribed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the district court concluded that a holding that Judge Bond's "manifest necessity" determination was based on a "scrupulous exercise of judicial discretion" could only proceed from an unreasonable application of clearly established federal law. Memorandum Opinion at 982, JA 469-70.

On appeal, Summit County Court of Common Pleas insists the Ohio Court of Appeals' decision passes muster under AEDPA review and contends the district court's order granting habeas relief should therefore be reversed.

II. ANALYSIS

A. Standard of Review

We review the district court's decision to grant

the writ of habeas corpus *de novo*. *Linscott v. Rose*, 436 F.3d 587, 590 (6th Cir.2006).

The "manifest necessity" question presented in this case has now been reviewed by numerous judges and has yielded several carefully reasoned opinions, among which there is no consensus. As the manifest necessity question finally reaches us on appeal in habeas, the merits of the question are viewed through multiple lenses of deference. Foremost among these lenses is that prescribed by Congress in AEDPA. Pursuant to AEDPA, in relevant part, a writ of habeas corpus shall not issue unless the state court adjudication "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In *Walls v. Konteh*, 490 F.3d 432 (6th Cir.2007), this Court recently explained and underscored the meaning of this standard in the context of an analogous double jeopardy claim:

> A state-court decision is considered "contrary to ... clearly established Federal law" if it is "diametrically different, opposite in character or nature, or mutually opposed." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (quotation marks omitted). Alternatively, to be found an "unreasonable application of ... clearly established Federal law," the state court decision must be "objectively unreasonable" and not simply erroneous or incorrect. *Id.* at 409-11, 120 S.Ct. 1495. In short, "a federal habeas court may

> not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also have been unreasonable."*Id.* at 411, 120 S.Ct. 1495.
>
> ....
>
> Moreover, "clearly established federal law" is determined by "the holdings, as opposed to the dicta," of United States Supreme Court decisions, as of the time of the state court decision under review. *Carey v. Musladin*, [549] U.S. [70], 127 S.Ct. 649, 653, 166 L.Ed.2d 482 (2006) (quoting *Williams*, 529 U.S. at 412, 120 S.Ct. 1495).

Walls, 490 F.3d at 436. Hence, the AEDPA standard of review requires the federal courts to give considerable deference to state court decisions. *Id.* at 435-36.

The substantive law defining a defendant's rights under the Double Jeopardy Clause is set forth most relevantly in *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), where the Court addressed the matter explicitly and thoroughly. In *Washington*, the Court reversed a ruling by the Ninth Circuit which had affirmed a grant of habeas relief based on double jeopardy. The Court held that the Ninth Circuit, by requiring an explicit finding of manifest necessity and explicit consideration of alternatives by the trial court, had

"attached undue significance to the form of the ruling." *Id.* at 503, 98 S.Ct. 824.

The *Washington* court recognized that a defendant's right, pursuant to the Double Jeopardy Clause, to have his trial, once commenced, completed by a particular tribunal, is a "valued right," but one which must sometimes "be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 503 n. 11, 98 S.Ct. 824. To proceed with a retrial after a mistrial has been declared over the defendant's objection in the first criminal trial, the prosecution must shoulder the "heavy burden" of demonstrating "manifest necessity." *Id.* at 505, 98 S.Ct. 824. "Manifest necessity" is not to be interpreted literally or applied mechanically; what is required is a "high degree" of necessity. *Id.* at 506, 98 S.Ct. 824. In assessing whether retrial should be barred, a sliding scale of scrutiny is employed, one that depends on the reasons for the mistrial. The strictest scrutiny is employed when the mistrial was premised on bad-faith conduct by the judge or prosecutor, and the most relaxed scrutiny is employed when the mistrial was premised on a deadlocked jury. *Id.* at 508-09, 98 S.Ct. 824.

When a mistrial is premised on the prejudicial impact of improper evidence or argument, the trial judge's evaluation of the *possibility* of juror bias is entitled to "great deference." *Id.* at 511-14, 98 S.Ct. 824. Notwithstanding this deference, the reviewing court must be satisfied that the trial judge did not act irrationally or irresponsibly, but exercised "sound

discretion." *Id.* at 514, 98 S.Ct. 824. The trial court's failure to make an explicit finding of "manifest necessity" does not render a mistrial declaration invalid, as long as the record provides sufficient justification for the ruling. *Id.* at 516-17, 98 S.Ct. 824.

Applying these principles, the *Washington* Court reversed the Ninth Circuit's ruling and upheld the trial court's declaration of a mistrial based on improper argument made by defense counsel in his opening statement. In reaching this result, the Court determined that the trial judge "exercised sound discretion" even though he made no explicit finding of manifest necessity and even though the mistrial was not strictly "necessary" inasmuch as the possibility of juror bias might have been neutralized by the giving of an appropriate cautionary instruction. "Nevertheless," the Court observed, "the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment."*Id.* at 511, 98 S.Ct. 824. The Court explained why this deference is appropriate:

> There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of

> the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.

Id. at 513-14, 98 S.Ct. 824 (footnote, citation omitted).

Thus, a federal court acting in habeas and reviewing state court rulings on the declaration of a mistrial based on the possibility of juror bias is obliged to scrutinize the state court rulings through two lenses of deference.

B. District Court Opinion

The district court's opinion is marked by a fundamental flaw. It misapprehends the controlling federal law and consequently fails to accord due deference to the Ohio Court of Appeals' ruling, per AEDPA.

In holding that the Ohio Court of Appeals' ruling represents an unreasonable application of clearly established federal law, the district court adopted five words from the Supreme Court's plurality opinion in *United States v. Jorn*, 400 U.S. 470, 485, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), "scrupulous exercise of judicial discretion," as the "holding" said to embody the state of "clearly established federal law" when the Ohio Court of Appeals issued its opinion. The district court concluded that the court of appeals' application of this standard was objectively unreasonable because "there is no way that any reasonable person would conclude that

the trial judge had employed 'scrupulous' exercise of judicial discretion to determine that a mistrial was a 'manifest necessity.'" Opinion p. 24, JA 469.

In making this assessment, the district court substantially confined its scrutiny to the record facts known to Judge Bond when she declared the mistrial. As evidence that Judge Bond did not act scrupulously, the district court cited the following facts: (1) she made no effort to ascertain the truth of what was contained in the foreperson's note; (2) she made no effort to determine whether the extra-judicial information had indeed resulted in corruption of a juror; and (3) although she gave the parties opportunity to state their positions, she did not fully explore available alternatives. *Id.* at 23-24, JA 468-69.

First, the language found in the plurality *Jorn* opinion is not a Supreme Court "holding" that reflects clearly established federal law. The term "scrupulous exercise of judicial discretion" does appear in the *Jorn* opinion, but it is not integral to the holding. The *Jorn* holding can only be ascertained in light of the facts of the case. In Jorn, the trial judge had refused to allow taxpayer witnesses to testify for the government because he did not believe the prosecuting attorney's assurances that they had been given adequate warnings of their constitutional rights. The judge then precipitously, without warning or consultation with counsel for the parties, discharged the jury. "[Indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a

continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so." *Jorn*, 400 U.S. at 487, 91 S.Ct. 547. The plurality opinion goes on to state the court's holding: "When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a *sound discretion* to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial." *Id.* (emphasis added).

Hence, the "scrupulous exercise of judicial discretion" language is actually dictum in *Jorn, i.e.*, a remark not essential to the *Jorn* holding. In *Jorn*, reprosecution was barred not because the trial judge failed to act "scrupulously," but because he "made *no effort* to exercise *sound discretion*." Thus, the "scrupulous exercise of judicial discretion" standard is not reflective of *Jorn*'s holding and is not reflective of clearly established federal law. That the "scrupulous exercise of judicial discretion" standard is not part of the clearly established federal law is confirmed by the fact that the term makes no appearance in *Arizona v. Washington*, which represents not only a more recent, but also a more thorough, treatment of the governing standards.

Moreover, the Ohio Court of Appeals' ruling is not contrary to or an unreasonable application of federal law as prescribed in *Jorn* because Judge Bond's declaration of mistrial cannot be said to have been marked by no effort to exercise sound discretion. Unlike the trial judge in *Jorn*, Judge Bond

did not act abruptly, but gave the parties opportunity to consider the ramifications of the foreperson's note; gave the parties opportunity to state their positions and proposals on the record; invited them to request her to conduct *voir dire* examination of the jurors; and explicitly considered and rejected at least some alternatives to declaration of a mistrial. Yes, there was room for improvement in Judge Bond's handling of the matter. The point here is simply to recognize that the facts of this case are clearly distinguishable from those presented in *Jorn*, which necessarily define the scope of its "holding." The *Jorn* opinion thus does not represent a sound foundation for the district court's assessment of the Ohio Court of Appeals' decision under controlling federal law.

C. Ohio Court of Appeals' Ruling

1. Petitioner's Objections

Petitioner maintains that the Ohio Court of Appeals' ruling is flawed. The specific question we confront, however, is whether it is contrary to or an unreasonable application of clearly established federal law.

Petitioner contends that the Ohio Court of Appeals subjected Judge Bond's declaration of mistrial to review for mere abuse of discretion and thereby applied the wrong standard of review. Petitioner insists it was not incumbent on him to show that Judge Bond abused her discretion. Rather, he argues, the prosecution should have been made to bear the burden of proving that Judge Bond's

declaration of mistrial constituted a "scrupulous exercise of judicial discretion."

Application of the *Jorn* "scrupulous exercise" language as governing standard has been shown to be erroneous. Careful reading of *Washington*, which contains more explicit instruction on the governing standards and represents a superior embodiment of clearly established federal law, reveals that a reviewing court is obliged to satisfy itself, with great deference to the trial judge's assessment of possible juror bias, that the trial judge exercised "sound discretion." The Ohio Court of Appeals was cognizant of its duty to ensure that Judge Bond exercised sound discretion. Citing *Washington*, 434 U.S. at 514-16, 98 S.Ct. 824, the court observed: "To exercise 'sound discretion' in determining that a mistrial is necessary, the trial judge should allow the defense and prosecution to state their positions on the issue, consider their competing interests, and explore some reasonable alternatives before declaring a mistrial." Decision p. 12, JA 354. By explicitly finding that Judge Bond had done these things, *id.* at 13, JA 355, the court of appeals at least implicitly held that she had exercised sound discretion. Hence, petitioner has failed to show that the court of appeals' opinion is based on application of an erroneous standard of review.

Petitioner's contention that the Ohio Court of Appeals failed to hold the prosecution to *its* burden of proving manifest necessity is similarly unavailing. Yes, the prosecution bears the burden of justifying the mistrial declared over the defendant's objection.

Washington, 434 U.S. at 505, 98 S.Ct. 824. In the present context, however, the burden question is largely a matter of semantics. There is no dispute regarding the facts and circumstances encountered collectively by the court and counsel during jury deliberations. Once the decision was collectively made not to *voir dire* any juror, the factual foundation for Judge Bond's decision to declare a mistrial, sufficient or not, was established. The question Judge Bond and later the court of appeals confronted was one of law and discretion: whether the undisputed facts supported a finding of manifest necessity, such that a mistrial could be declared without prejudice to the state's right to reprosecute. Hence, the fact that the court of appeals did not couch its analysis in terms of whether the prosecution carried its burden is of little significance. The focus is not on the adequacy of the prosecution's performance, but on the requirements of the Double Jeopardy Clause. Further, as *Washington* makes clear, the failure of a lower court to explicitly explain its ruling in terms of the governing standard is not determinative, as long as the record provides sufficient justification for the ruling. 434 U.S. at 516-17, 98 S.Ct. 824.

Petitioner also contends the court of appeals evaluated Judge Bond's actions based on an improperly truncated record. Petitioner insists that consideration of the evidentiary record created by Judge Cirigliano, including evidence regarding the discovery of the completed verdict forms, is essential to assessing the soundness of Judge Bond's exercise of discretion. He contends the court of appeals, by

limiting its review of manifest necessity to the facts known to Judge Bond when she declared the mistrial, disregarded Judge Bond's authority to revisit her mistrial ruling. Petitioner argues that under Ohio law, Judge Bond's oral declaration of mistrial, albeit on the record, had not become final and effective at the time the verdict forms were discovered because it had not been memorialized in a journal entry. *See State v. Stewart*, 2002 WL 31886657 at *3 (Ohio Ct.App. 11 Dist., Dec. 27, 2002)("It is axiomatic that a court speaks only through its journal, and not through oral pronouncements."). Upon discovering the verdict forms, Judge Bond thus retained the power to alter her mistrial ruling. Inasmuch as the verdict forms demonstrated that the extraneous information mentioned in the foreman's note had not resulted in prejudice to him in relation to the most serious charges he was facing, petitioner contends the manifest necessity determination could and should have been revisited, and the Ohio Court of Appeals' conclusion that Judge Bond did not abuse her discretion when she failed to do so was objectively unreasonable.

First of all, the authority of a trial court under Ohio law to reconsider its decision after having discharged the jury in open court is limited-even before the journal entry has been made. It is a determination that must be made "on a case-by-case basis based upon the facts of each particular situation." *Gugliotta v. Morano*, 161 Ohio App.3d 152, 829 N.E.2d 757, 762 (Ohio Ct.App. 9 Dist., 2005). In *Gugliotta*, the trial court had, after a momentary *ex parte* discussion with the jury, reconsidered its

open-court decision to grant a mistrial and discharge the jury. After speaking with the jurors while she was in the process of dismissing them, the trial judge changed her mind, reconvened the jury in the courtroom, and instructed them to resume their deliberations. In response to objection by one of the parties, the trial judge conducted *voir dire* examination of the jurors to confirm that her *ex parte* communications had not resulted in any prejudice. She then allowed them to continue their deliberations until they reached a verdict. After careful review of the record, the Ohio Court of Appeals held that, despite the lack of demonstrable prejudice resulting from the interim *ex parte* contact, the potential for prejudice was too great. *Id.* at 764. The court upheld the finality of the original oral decision to discharge the jury so as to avoid setting the stage for "limitless inquests regarding the trial court's discharge, or failure to discharge, a jury." *Id.* The trial court was held to have abused its discretion when it reconvened the jury.

In *Stewart*, too, the trial court reconvened a jury a few minutes after having declared a mistrial and discharged the jury. 2002 WL 31886657 at *2. The trial court had mistakenly believed the jury was deadlocked in its deliberations on all pending charges. It reconvened the jury upon discovering signed ballots in the jury room. The jury was reconvened, however, not for the purpose of resuming deliberations, but solely for the purpose of confirming that the jurors had not been deadlocked in their deliberations on all charges, but had in fact reached a unanimous verdict on three of the four

charges, finding the defendant guilty of two charges. Upon polling the jurors, the court accepted the verdicts that had been agreed upon and declared a mistrial on the outstanding charge. The court of appeals upheld the judgment, holding that the oral order declaring a mistrial and discharging the jury was not final when reconsidered because it had not been journalized. *Id.* at *3.

The unpublished opinion in *Stewart* may be reconcilable with the more recent published opinion in *Gugliotta* on the basis of its materially distinguishable facts. At the very least, however, *Gugliotta* teaches that a trial court's authority to reconsider an order discharging the jury is narrowly circumscribed and must be justified by the particular facts presented. Careful scrutiny of the instant facts, to the extent they are developed in the record, reveals that they more closely resemble those presented in *Gugliotta* than those presented in *Stewart*.

The verdict forms represented a surprising development-the sort of surprise Judge Bond had attempted to prevent by proposing *voir dire* examination of the jurors when the foreperson's note was first delivered to her. Yet, both parties had steadfastly objected to the proposal, preferring to take their chances with Judge Bond's ruling on the question of mistrial. It was certainly foreseeable that, once the status of the jurors' deliberations came to light, one party or the other would come to regret the earlier failure to *voir dire* the jurors. Yet, both were willing to assume this risk.

It is undisputed that the verdict forms played no role in Judge Bond's decision to declare a mistrial. In her opinion, the verdict forms, discovered during *ex parte* communications between herself and the jurors, after the mistrial had been declared and the jurors were officially discharged, but before they were actually dismissed, simply came to light too late to make a difference. Hrg. tr. pp. 156-58, JA 262-64. Consistent with the"well established" teaching of *Gugliotta,* 829 N.E.2d at 762, Judge Bond believed that the jury could not be reassembled at that point because the jury had already been discharged and the case had been adjourned. Hrg. tr. p. 108, JA 214.

Moreover, the mere fact of the intervening *ex parte* communications, creating at least a substantial "potential for prejudice,"all but foreclosed the possibility of reconvening the jury. *Gugliotta,* 829 N.E.2d at 764.[4] The record does not disclose the details of the *ex parte* discussions. We know that the jurors were "extremely upset" on receiving the news that a mistrial had been declared and that Judge Bond tried to "accommodate the emotion in the room."Hrg. tr. pp. 61, 104, JA 163, 210. Judge Bond did not make inquiry as to the source of the extraneous polygraph

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[4] *See also Watkins v. Cleveland Clinic Found.*, 130 Ohio App.3d 262, 719 N.E.2d 1052, 1063 n. 7 (Ohio Ct.App. 8 Dist., 1998) (" *Ex parte* communications to the jury by the trial court are anathema and should not be countenanced except in times of extraordinary pressing necessity.").

information in the jury room. *Id.* 126, JA 232. Judge Bond told one concerned juror that there was additional evidence that had not been introduced and that defendant Ross would be re-tried. *Id.* at 65, JA 167. Though the complete details of the communications remain undisclosed, these facts, of which Judge Bond was necessarily aware, substantiate the "potential for prejudice" much more strongly than the circumstances which, in *Gugliotta*, were held to foreclose reconvening the jury after it had been discharged.

Judge Bond also believed the partial verdict ostensibly reached by the jury before their deliberations were interrupted, whether guilty or not guilty, could not be accepted because any verdict was irreversibly tainted by juror corruption. Hrg. tr. at 108, 134, JA 214, 240. Indeed, the verdict forms discovered in this case stood on quite a different footing than those discovered in *Stewart*, where the jury had been prematurely discharged on the trial judge's mistaken understanding that it was deadlocked on all charges. In *Stewart*, it was a simple matter to confirm that the ballots discovered in the jury room accurately reflected the final and unanimous decision of the jury on three of the four pending charges and to accept them as the jury's verdict. In *Stewart*, there was no concern about the jury's impartiality having been tainted by extraneous information or by intervening *ex parte* communications with the trial court or its staff.

Here, in contrast, the mistrial was declared and the jury discharged because a note from the

foreperson indicated jurors' concerns about juror corruption-corruption that arguably resulted in prejudice to both parties and undeniably impugned the integrity of the jury's deliberations. In fact, it appears to have been the very unanimity of the tentative verdicts, being inconsistent with the tenor of the jurors' deliberations, that precipitated the jurors' concerns in the first place-during the pendency of ongoing deliberations. The extent of the prejudice remained uncertain because the parties adamantly objected to *voir dire* of the jurors and Judge Bond elected not to overrule the objection and conduct *voir dire sua sponte*. When the verdict forms were discovered, they helped define the extent of the prejudice emanating from the juror corruption and suggested that, at least in relation to three of five charges still pending against petitioner, the extraneous polygraph information had not resulted in prejudice to him. The extent to which the juror corruption had resulted, however, in prejudice to the prosecution's interest and the public's interest in a fair trial remained indeterminate. Judge Bond *arguably* could have made inquiry of the jurors to answer this question, but in doing so, would have run afoul of *Gugliotta*'s proscription against "limitless inquests regarding a trial court's discharge, or failure to discharge, a jury." 829 N.E.2d at 764. Further, it is practically inconceivable that the taints stemming from both the juror corruption and the *ex parte* communications could have been cured in such a way as to render the tentative verdict forms acceptable as reflective of the jury's final verdict.

To be sure, Judge Bond's handling of the discovery of the signed verdict forms-releasing the jurors before advising counsel of the discovery and giving them opportunity to comment on their significance-was far from commendable. Yet, when the existence of the verdict forms was made known to counsel, neither party asked Judge Bond to reconsider the mistrial ruling or for any other relief. *Id.* at 149, JA 255. Hence, whether the late-discovered verdict forms could have been legitimately used to justify Judge Bond's reconsideration of her mistrial ruling is, on the present record, a matter of speculation. What is clear from the above discussion, however, is that petitioner's argument, with reference to Ohio law, that Judge Bond's failure to *sua sponte* reconsider her mistrial was an abuse of discretion is unpersuasive. Instead, it appears likely that if Judge Bond had explicitly reexamined her mistrial ruling in light of the late-discovered verdict forms, she would have been constrained to confirm the ruling.[5]

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Petitioner's reliance on *Corey v. District of Vermont, Unit # 1*, 917 F.2d 88 (2d Cir.1990), is similarly misplaced. In *Corey*, a state trial judge had determined that it was necessary to declare a mistrial after the jury was improperly exposed to information prejudicial to the defendant during its deliberations. 917 F.2d at 89. Before the judge could declare a mistrial, however, the jury returned a verdict of not guilty. *Id.* Despite this information, the judge proceeded to declare a mistrial. *Id.* The Second Circuit held that, although manifest necessity may have once existed, a mistrial was no longer necessary once the jury returned a verdict of not guilty, as it was then clear that the defendant had not been deprived of

Even more importantly, it follows that the Ohio Court of Appeals did not err by excluding the verdict forms from its review of Judge Bond's mistrial ruling. An appellate court is hardly at liberty to use the 20/20 vision of hindsight in evaluating whether a mistrial decision represented an exercise of sound discretion, but must, in the exercise of due deference, necessarily confine its review to the facts

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his right to a fair trial. *Id.* at 92.There are significant differences between the events that transpired here and those that occurred in *Corey*. First, the trial judge in *Corey* had only informed the parties' lawyers of his intent to declare a mistrial when the jury returned a verdict. 917 F.2d at 89. Here, on the other hand, the trial judge had declared a mistrial in open court and had officially adjourned the case and declared that the jury was to be discharged before learning of the jury's tentative, partial verdict. Second, in *Corey*, the misconduct necessitating a mistrial was prejudicial only to the defendant, 917 F.2d at 91, and thus the judge could determine from a "not guilty" verdict that the verdict was not affected by the misconduct. In this case, the jury note indicated prejudice to the interests of both the prosecution and defendant Ross. While the late-discovered tentative not-guilty verdict forms suggested that the extraneous information had not resulted in prejudice to Ross, they did not suggest that the prosecution was not prejudiced. Finally, whereas in *Corey*, the jury had reached a final verdict on all charges and had not yet been formally discharged when the judge learned of its verdict, 917 F.2d at 89, here the jury was in the middle of its deliberations when Judge Bond declared a mistrial and had been officially discharged before she learned of the verdict forms. Given that jurors were "extremely upset"by news of the mistrial and were privy to ex *parte* discussions with Judge Bond, it is extremely doubtful that the jury could have been properly reconvened. At that point, the sanctity of their deliberations had been seriously compromised.

known to the trial judge when the mistrial was declared. It is undisputed that Judge Bond knew nothing of the verdict forms at the time she declared the mistrial. Even if she had the authority and ought to have explicitly reexamined the decision when she became aware of the verdict forms, it appears she would have been unavoidably constrained under Ohio law to confirm the decision. We therefore find no error in the court of appeals' decision to confine its review of her manifest necessity determination to the facts known to her when she made the ruling. Finally, and most importantly, for purposes of our limited review under AEDPA, the court of appeals' refusal to engage in such speculative analysis has not been shown to be contrary to or an unreasonable application of clearly established federal law, as set forth in any holding of the United States Supreme Court.

2. Merits of Ohio Court of Appeals' Decision

We turn next to the task of reviewing the merits of the Ohio Court of Appeals' ruling. The court of appeals did not fault Judge Bond for failing to determine whether the contents of the foreperson's note were true, observing that notes received from the jury are typically accepted at face value. The court of appeals characterized the note, advising the court of juror misconduct, as "inherently reliable." The court of appeals further observed that neither party questioned the truthfulness of the note and both objected to Judge Bond's proposal to *voir dire* the foreperson or other jurors. In these matters, nothing smacks of an unreasonable application of

controlling federal law.

As to Judge Bond's failure to conduct *voir dire* examination of jurors to ascertain whether the extraneous polygraph information had actually influenced their deliberations, the court of appeals again emphasized both parties' express objections to *voir dire*: "To fault the original trial judge, in hindsight, for failing to voir dire the jurors over the objections of both parties is a tactic that this court cannot countenance."Decision p. 19, JA 361. In evaluating Judge Bond's exercise of discretion, the court of appeals noted that she clearly considered the option of questioning the jurors, but she deferred to the joint request of the parties that she refrain from doing so. The court of appeals observed: "That the trial judge honored the wishes expressed by the parties and did not voir dire any of the jurors seems to comport with an exercise of sound discretion, not an abuse of it."*Id.* at 20-21, JA 362-63.

Naturally, Judge Bond had the prerogative to conduct *voir dire* examination of the jurors over the parties' objections to ensure a fair trial by an impartial jury. *See United States* v. *Davis*, 177 F.3d 552, 557 (6th Cir.1999) (recognizing trial court's duty to investigate possible juror misconduct). By doing so over the parties' objections, however, Judge Bond would arguably have risked creating a situation where, because of her unilateral intrusion into the sanctity of deliberations, a declaration of mistrial *with prejudice* might have become necessary. In that eventuality, *the court* would potentially have been responsible for defeating "society's interest in

giving the prosecution one complete opportunity to convict those who have violated its laws." *Washington,* 434 U.S. at 509, 98 S.Ct. 824. Considering that the note, taken at face value, evidenced corruption of at least one juror due to juror misconduct (not misconduct of the court or either party or their counsel);[6] and considering that the corruption appeared to potentially prejudice the interests of the defendant, the prosecution and the public; and considering that both parties objected to questioning the jurors, Judge Bond's decision to refrain from questioning the jurors represented the safer and, at least arguably, more prudent course.

The court of appeals' deference to Judge Bond's decision not to *voir dire* the jurors is also consistent with *Washington*'s insistence on appellate deference to the trial judge's evaluation of *possible* juror bias: "[T]he overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial

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6 Judge Bond identified three aspects of juror misconduct evidenced by the note: (1) the complained-of juror had formed, and expressed to other jurors, an opinion about the defendant's guilt or innocence based on information not introduced in evidence; (2) the juror had refused to deliberate in good faith and had surrendered his own opinion, not because he was persuaded it was wrong, but in order to get the case over with; and (3) the juror had insisted on completing deliberations quickly because he had personal affairs to attend to that precluded his continuing participation in deliberations. Hrg. tr. pp. 109-10, JA 215-16.

judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *Id.* at 511, 98 S.Ct. 824. In any event, the court of appeals' ratification of Judge Bond's failure to conduct *voir dire* has not been shown to be an unreasonable application of controlling federal law. In response to petitioner's argument that Judge Bond did not adequately consider all alternatives before finding manifest necessity for mistrial, the court of appeals correctly held that she had no duty to consider every conceivable alternative. That she exercised sound discretion, the court concluded, is evidenced by the fact that she did consider *some* reasonable alternatives before declaring a mistrial. The court of appeals noted that Judge Bond: (1) considered *voir dire* examination of the jurors, but deferred to the parties' wishes; (2) considered the possibility of replacing the problem juror with an alternate, but reasonably rejected this remedy as insufficient to remove the taint; and (3) considered defendant's request to allow the jury to continue deliberating (without prejudice to his right to a mistrial if the jury returned an adverse verdict), but rejected this proposal as unfair to the public's interests.[7]

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[7] In continuing to quarrel with Judge Bond's rejection of this latter proposal, petitioner continues to ignore the fact that the import of the foreperson's note was at least as unfavorable to the prosecution as it was to his interests. *See* n. 3, *supra*. Because the prejudicial import of the note cut both ways, Judge Bond rightly concluded, as the court of appeals held, that petitioner's putative reservation of the right to a mistrial in

Again, the court of appeals' analysis in this regard has not been shown to be contrary to or an unreasonable application of controlling federal law. In *Washington*, the Court made it clear that a court need not exhaustively consider all possible alternatives before finding "manifest necessity" for a mistrial. Even where an alternative remedy as simple as a cautionary instruction might have been effective, rendering declaration of a mistrial not "necessary" in the strict, literal sense, the *Washington* Court declined to second-guess the soundness of the trial court's exercise of discretion. 434 U.S. at 511, 98 S.Ct. 824.

The court of appeals' decision is also consistent with *Washington*'s "sliding scale of scrutiny" teaching. Because the mistrial was not precipitated by prosecutorial or judicial misconduct or error, the strictest scrutiny is not appropriate. See *id.* at 508, 98 S.Ct. 824. In fact, this case is akin to a deadlocked jury situation (i.e., where fault is not attributed to any party, counsel or the judge) and is therefore at the opposite end of the scale, warranting the most relaxed scrutiny. Yet, it is evident that the court of appeals did not merely rubber-stamp Judge Bond's decision; it carefully explained why her decision was good enough to pass muster as an exercise of sound discretion.

The predominant thrust of the *Washington*

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the event the verdict was not satisfactory to him was unfair and unreasonable.

opinion, which is well-illustrated by its holding, is its emphasis on the need for appellate courts to recognize the trial court's prerogative to "exercise broad discretion in deciding whether or not 'manifest necessity' justifies a discharge of the jury." *Id.* at 509, 98 S.Ct. 824. The Court recognized that society's interest in orderly, impartial procedure would be impaired if the trial judge were hindered by a concern that any time a reviewing court disagreed with his assessment, a retrial would automatically be barred. *Id.* at 513, 98 S.Ct. 824. Accordingly, the Court expressly abjured a stringent standard of appellate review in this area, saying that it would seriously impede the trial judge in the performance of his duty to take prompt and affirmative action to protect the integrity of the trial. *Id.* The Court observed that reversal of the trial judge's determination *would* be appropriate if, instead of exercising sound discretion, he acted "irrationally or irresponsibly," citing *Jorn* as an example. *Id.* at 514, 98 S.Ct. 824.

Here, even petitioner has not accused Judge Bond of acting "irrationally or irresponsibly"in the time leading up to her declaration of the mistrial.[8]

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[8] Petitioner has attempted to cast doubt upon the soundness of the mistrial declaration by emphasizing Judge Bond's questionable handling of the jurors and discovery of the verdict forms after the mistrial had already been declared. The court of appeals acknowledged that it was hard to ignore this information, but correctly held that "[f]acts unknown to the trial judge and the parties simply cannot enter into the review of the trial court's decision." Decision p. 8, JA 350.

Under all the circumstances, if the Ohio Court of Appeals had overruled Judge Bond's assessment of manifest necessity (imperfect though it was), the court, in effect, would have applied the sort of stringent standard of review expressly abjured in *Washington*. It necessarily follows that the court of appeals' ruling is not contrary to nor an unreasonable application of controlling federal law, as clearly established in *Washington*, the leading Supreme Court opinion on double jeopardy.

This conclusion is consistent with and further buttressed by the Sixth Circuit's recent decision in *Walls* v. *Konteh*, 490 F.3d 432 (6th Cir.2007), applying deferential AEDPA review and reversing a district court's order granting habeas relief on double jeopardy grounds. In *Walls*, the state trial judge declared a mistrial at the start of the second day of a criminal trial, on that infamous day in our nation's history, September 11, 2001. When airliners began falling out of the sky and crashing into buildings, the jury was excused, the trial was adjourned, and the courthouse was evacuated. Due to confusion caused by unfolding world events, the trial judge was concerned that jurors would be unable to concentrate and that the parties' right to a fair trial was compromised. After consulting with counsel, the trial judge declared a mistrial over defendant's objection. A second trial was commenced two months later and defendant was convicted. On appeal, the defendant challenged his conviction on double jeopardy grounds. The Ohio Court of Appeals upheld the conviction and this Court held that the court of appeals' ruling was not contrary to

controlling federal law. Although the trial judge did not deliberately explore all available alternatives, and although the mistrial was not strictly "necessary," the trial judge was deemed to have exercised "sound discretion"because he did not act irrationally or irresponsibly, he was motivated by genuine concern about the possibility of juror bias, and he considered some alternatives to mistrial. His determination, under unique circumstances, was therefore held to be neither contrary to nor an unreasonable application of any holding of the United States Supreme Court. *Id.* at 438-39.

Our decision today is entirely consistent with the analysis employed in *Walls*. The circumstances with which Judge Bond was faced were not quite as unique as those presented in *Walls*, but the likelihood of juror misconduct and corruption was even more clearly established. Judge Bond's handling of the matter, like the trial court's handling of the circumstances it faced in *Walls*, could have been better. Yet, as *Washington* makes clear, the *manner* in which the mistrial ruling was made is not determinative. *See Walls*, 490 F.3d at 438. As long as "the record provides sufficient justification for the state-court ruling,"demonstrating that the court did not act "irrationally or irresponsibly,"as did the trial judge in *Jorn*, but exercised "sound discretion," the ruling is not constitutionally defective. *Washington*, 434 U.S. at 514, 516-17, 98 S.Ct. 824.

It follows that the Ohio Court of Appeals' ruling upholding Judge Bond's declaration of mistrial is consonant with the teaching of *Washington* and has

not been shown to contravene or misapply any holding of the Supreme Court. Accordingly, we conclude, with due regard for the principles of comity, finality and federalism that AEDPA is designed to serve, *see Walls*, 490 F.3d at 439 n. 4, that the court of appeals' decision does not represent an unreasonable application of clearly established federal law and that reprosecution of petitioner Denny Ross is not barred by the Double Jeopardy Clause.

III. CONCLUSION

For the foregoing reasons, the district court's judgment, granting the petition for writ of habeas corpus, is **REVERSED.**

RALPH B. GUY, JR., Circuit Judge, dissenting.

I respectfully dissent because I believe that even if manifest necessity for a mistrial existed at one point, it dissipated once Judge Bond learned of the verdicts. Importantly, Judge Bond's declaration of a mistrial was not final when pronounced orally from the bench. The mistrial was not official until entered in the journal, and the mistrial was not entered into the journal until Thursday, November 2, 2000. *State v. Stewart*, 2002 WL 31886657 at *3 (Ohio Ct.App. Dec. 27, 2002). In *Stewart*, the defendant was charged with kidnaping and aggravated burglary with a firearm specification. After the jury had begun deliberations, they returned to the courtroom and informed the judge that they could not reach a consensus on the firearm specification. The judge mistakenly believed that they could not reach a

consensus on any of the charges. She dismissed the jury and orally declared a mistrial. A few minutes later, it was discovered that the jury had signed the verdict forms for three of the charges-guilty as to two, not guilty as to one-but left only the form regarding the firearm specification blank. The jury was immediately called back, the verdicts were read, and the jurors polled. The defendant appealed, arguing, *inter alia*, that the trial court erred by entering the guilty verdicts after a mistrial had been declared. The Ohio court rejected the defendant's challenge to the entry of the guilty verdicts with language equally applicable to this case:

> It is axiomatic that a court speaks only through its journal, and not through oral pronouncements. *Schenley* v. *Kauth* (1953), 160 Ohio St. 109, 113 N.E.2d 625, paragraph one of the syllabus. The trial court's mistaken oral declaration of a mistrial did not actually result in a mistrial because a mistrial judgment was never journalized. Thus, the trial court was not prevented from realizing that it had misunderstood the communication from the jury, and correcting its erroneous decision to dismiss the jury and declare a mistrial. Appellant's assertion that the trial court erred as a matter of law by accepting the jury's verdict after declaring a mistrial is not well taken.
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> Appellant argues that, because the jurors

> could change their minds on the verdict between the time they signed the ballots and the time they were polled, they can not be said to have agreed on the verdict until the court has polled them and accepted the verdict. We refuse to follow this restrictive view of what constitutes the jury's agreement on a verdict. The jury, at the time each of the jurors signed the verdict forms, had agreed upon its verdict. The fact that a juror could have changed his or her mind after signing the ballot is immaterial. The jury had agreed on its verdict, as subsequently polled, and each juror confirmed that the judgment represented by the ballots was, in fact, his or her verdict. Thus, we conclude that the court's acceptance of the jury's verdict did not violate R.C. 2945.33.

Id. at *3.

In my view, once the trial judge was aware of the verdicts of acquittal, the possibility of juror bias toward Ross was eliminated. Once the possibility of bias against Ross was eliminated, the manifest necessity for the mistrial was also eliminated, at least on the counts for which the jury acquitted Ross. The trial court's error was not in failing to enter the verdicts, but ignoring the existence of the verdicts. A similar situation was presented in *Corey v. District Court of Vermont, Unit # 1*, 917 F.2d 88, 89 (2d Cir.1990), in which the defendant was tried in state court for murder and aggravated assault. He was accused of shooting the victim from a distance of 92 feet. While the jury was deliberating, one juror

knocked on the jury room door and asked the sheriff how far 92 feet was. The sheriff began pacing off 92 feet. The trial judge was notified of what was happening and immediately ordered the jury back to the jury room. After discussing the matter with the attorneys, the judge gave the jury curative instructions. The judge and attorneys then resumed their discussion in the judge's chambers. The judge decided that a mistrial was necessary but that it should be declared in open court. As the judge and attorneys were preparing to return to court, the jury reported that it had reached a verdict. When the defendant asked that the judge not grant the mistrial, the judge stated that he had already declared the mistrial but would have the verdict reported for the record. The verdicts were "not guilty" on each count. The defendant filed a motion for judgment of acquittal, which the trial court denied. He appealed, but the Vermont Supreme Court affirmed. The federal district court denied his habeas petition, but the Second Circuit reversed finding that although manifest necessity may have existed prior to the moment the judge learned of the verdicts, there was no longer manifest necessity after the verdicts were read. The Second Circuit explained: "The trial court no longer has to speculate about the possible impact of misconduct affecting the jury. The trial court can look to the verdict for an answer. The failure to take into account the jury's verdict in this case constitutes an abuse of discretion."917 F.2d at 92. The possibility that the trial judge had already declared a mistrial orally was of little import:

> [I]t is not enough to state that the trial court had declared a mistrial before the jury notified the court that it had reached a verdict. The jury was permitted to continue in its deliberations, unaware of the proceedings in chambers. When it reached its verdict, the trial judge was given a unique opportunity. An acquittal would reveal the absence of prejudice to the defendant. With no prejudice to the defendant and no articulation of any prejudice by the state to its case, the only remaining basis for a finding of manifest necessity would be the public interest in a trial free of even the perception of an inappropriate influence on the jury. Nevertheless, the limited public interest in having a trial free of *all* possible taint, whether prejudicial or not, by itself cannot overcome Corey's constitutionally protected valued right to have his trial completed by a particular tribunal.

Id. at 91 (internal quotation marks and citation omitted).

The state has not alleged any specific prejudice against it other than the public's right to fair trials and the public perception that a juror unwilling to vote his conscience may have gone along with a verdict just to end deliberations sooner. I agree that those concerns are legitimate, but they are not strong enough to override a defendant's protection against being tried twice for the same crimes. The state also stresses that the jury did not

reach a verdict on every count for which Ross was charged, including the lesser-included offense of manslaughter. That fact does not change my conclusion that once it was known that verdicts had been reached on the most serious counts, reexamination of the need for a mistrial was required. Finally, the state emphasizes that because the juror's note to the judge was written after the jury reached the three verdicts, it is clear that the jury was still deliberating and could have changed its mind as to the three verdicts. That the jury was still deliberating at the time the mistrial was declared is beyond dispute. But that fact did not foreclose the possibility of, at the very least, questioning the jurors in open court after the verdicts were discovered. It may have been determined, for instance, that the verdicts were still tentative in the jurors minds, or that they were completely finished considering those counts. Once the verdicts were discovered, the trial court should have immediately brought the verdicts to the attorneys' attention and considered all alternatives. Irrespective of the majority's attempt to distinguish *Stewart* and *Corey*, the facts in this case compel me to conclude that the state court's finding that there was manifest necessity constituted an unreasonable application of clearly established federal law.

FILED
Jul 17, 2008
LEONARD GREEN, Clerk

Nos. 05-4212, 05-4213

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNY ROSS, Petitioner-Appellee/ Cross-Appellant, v. MARC E. DANN, Attorney General for the State of Ohio, Respondent, and SUMMIT COUNTY COURT OF COMMON PLEAS, Respondent-Appellant/ Cross-Appellee	)	ORDER

BEFORE: GUY, ROGERS and McKeague, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members,

but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and finds no reason to alter or amend its analysis of the issues addressed in its original opinion. However, the panel agrees with petitioner that certain issues raised in his cross-appeal warrant more explicit treatment than they were given in our original ruling. Our resolution of these pretermitted issues, set forth below, does not alter the outcome of our original ruling reversing the district court's award of habeas corpus relief.

First, petitioner challenges, as contrary to clearly established federal law, the Ohio Court of Appeals holding that he was not entitled to a pretrial evidentiary hearing on his motion to bar retrial on double jeopardy grounds. The claim is based on a mischaracterization of the Ohio Court of Appeals' decision. The court of appeals expressly acknowledged that petitioner was properly afforded a pretrial hearing on his double jeopardy claim. However, the court confined its review of the "manifest necessity" determination to the record facts known to the trial judge and the parties at the time the mistrial was declared. The court of appeals refused to evaluate the soundness of the trial judge's exercise of discretion in light of facts not known to her. For the reasons stated in our original opinion, this decision was neither contrary to nor an unreasonable application of clearly established federal law.

Second, petitioner contends that the Ohio Court of Appeals' decision is contrary to federal law insofar as it upholds the trial court's rejection of his request to allow the jury to continue deliberating to verdict, subject to post-verdict declaration of a mistrial at his option if the verdict turned out to be unfavorable. Petitioner insists that, in the face of evidence of juror corruption, he had the absolute right, per United States v. Dinitz, 424 U.S. 600, 608 (1976), to proceed to verdict with his chosen jury if he wished. Petitioner is wrong.

The holding in Dinitz, which is what matters for purposes of ascertaining clearly established federal law, was a reversal of the Fifth Circuit's ruling that retrial of the defendant, who had consented to the declaration of a mistrial, violated his double jeopardy rights. That is, in Dinitz, the Supreme Court upheld the defendant's conviction in a second trial, as not violative of double jeopardy. The Dinitz court noted that, in the event of a prejudicial judicial or prosecutorial error that might be thought to warrant declaration of a mistrial, a trial court should not foreclose the defendant's prerogative to have the "trial completed by a particular tribunal" unless "the ends of public justice would not be served by a continuation of the proceedings." Id. at 606-09. Even assuming, the Dinitz court reasoned, that the trial judge "overreacted," and thereby contributed to the circumstances that led to the declaration of mistrial, there was no showing that the judge was motivated by bad faith. Id. at 611. Hence, the trial court was held not to have improperly foreclosed the defendant's option and the Fifth Circuit's ruling

that the declaration of mistrial was not supported by manifest necessity was reversed.

Here, the trial court was not faced with judicial or prosecutorial error, but with the strong possibility of juror corruption; corruption which the trial court identified as having a threefold nature and which potentially resulted in prejudice to both defendant Ross and the prosecution. As an alternative to mistrial, Ross requested that the jury be instructed to continue deliberating – on the condition that a mistrial be declared if it reached a verdict unfavorable to him. Contrary to petitioner's argument, this alternative is not an option recognized in Dinitz. Further, it is an alternative that the trial court properly recognized would have been unfair, under the circumstances, to the prosecution and to the public's interest in fair trials. Moreover, although the trial judge's handling of the juror corruption problem left room for improvement, as did the trial judge's actions in Dinitz, there is here no showing of bad faith or irrational behavior by the judge that would militate against a finding that the declaration of mistrial represented an exercise of sound discretion. For all these reasons, we conclude that the Ohio Court of Appeals' rejection of petitioner's argument based on Dinitz is not contrary to or an unreasonable application of federal law.

Third, petitioner contends the Ohio Court of Appeals made an unreasonable determination of facts by holding that the trial court considered the parties' competing interests before declaring a mistrial. As evidence of the trial court's disregard of his interests, petitioner points to the trial judge's

acknowledgment that she was unfamiliar with the proposition, discussed above, for which the petitioner now relies on the Supreme Court's Dinitz decision. We, too, find petitioner's construction of Dinitz untenable. Hence, the trial court's rejection of his request to instruct the jury to continue deliberating, subject to post-verdict declaration of a mistrial in the event of an unfavorable verdict, does not evidence a failure to consider competing interests. The Ohio Court of Appeals' ruling is not, in this regard, marked by an unreasonable determination of the facts.

Finally, petitioner argues that the Ohio Court of Appeals made an unreasonable determination of the facts insofar as its ruling is premised on a finding of juror misconduct. Petitioner contends the trial court never developed the record on the juror misconduct evidenced by the note from the foreman. The court of appeals did not make findings of fact; it decided whether the trial court's declaration of a mistrial represented an exercise of sound discretion. In exercising its discretion, the trial court did not make a finding regarding the nature and extent of juror corruption, because both parties objected to voir dire examination of the jurors, the trial court was constrained to decide whether to declare a mistrial based on an incomplete record. The Ohio Court of Appeals upheld the trial court's decision as an exercise of sound discretion. Its ruling is not marked by any unreasonable determination of the facts and, as we concluded in our original opinion, the ruling is not otherwise contrary to or an unreasonable application of federal law.

Accordingly, the petition for rehearing and for rehearing en banc is **DENIED**.

RALPH B. GUY, JR., Circuit Judge, concurring. Although I continue to adhere to my original dissent, I concur in the decision denying the petition for rehearing and rehearing en banc.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

Nos. 05-4212, 05-4213

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

DENNY ROSS,
Petitioner-Appellee/
Cross-Appellant,

v.

JAMES PETRO,
Attorney General for the State of Ohio,
Respondent,

SUMMIT COUNTY COURT OF COMMON PLEAS,
Respondent-Appellant/
Cross-Appellee

BEFORE: GUY, ROGERS and McKeague, Circuit Judges;

Upon consideration of the motion to stay mandate,

It is ORDERED that the mandate be stayed to allow appellee-cross-appellant time to file a petition for writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within 90 days from the date

of final judgment by this court.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

Issued: August 04, 2008 /s/ Leonard Green